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No. _____

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

SERENE G. SHAPER,
Petitioner,
v.

ROGER W. TRACY,
Tax Commissioner of Ohio,
and

BETTY MONTGOMERY,
Attorney General of Ohio,
Respondents.

Petition for a Writ of Certiorari to the Ohio Tenth Appellate District Court of Appeals

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a State may, consistent with the Commerce Clause, impose its income tax on out-of-state municipal bond interest while exempting interest received from in-state municipal bond issuers.

2. Whether State courts entertaining State declaratory challenges to a State tax statute may refuse to hear such claims asserted under 42 U.S.C. § 1983.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	vi
OPINIONS BELOW	1
JURISDICTION	2
CONSTITUTIONAL, STATUTORY AND OTHER PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	4
A. Introduction	6
B. Overview of Argument	7
REASONS FOR GRANTING THE PETITION	8
I. A STATE'S DISCRIMINATORY INCOME TAXATION OF INTEREST ON OTHER STATES' MUNICIPAL BONDS, WHILE EXEMPTING INTEREST ON IN-STATE BONDS, IS AN EXPLICIT DISCRIMINATION AGAINST INTERSTATE COMMERCE, AND IS NOT EXEMPTED FROM COMMERCE CLAUSE SCRUTINY BECAUSE ITS PURPOSE IS TO BENEFIT THE STATE'S SOVEREIGN INTEREST, AS DISTINCT FROM LOCAL PRIVATE INTERESTS	8
A. This Is An Issue Of Overwhelming Importance:	
(1) to the states, because this type of statutory discrimination exists in 37 states;	

TABLE OF CONTENTS—Continued

Page

(2) to the state courts and legislatures, who are themselves uncertain about its constitutionality and are unable to dispassionately adjudicate and resolve the issue; and

(3) to the nationwide municipal bond market, since it would eradicate the current state barriers to the nationwide flow of municipal bonds 8

a. This issue is of overwhelming importo the states and their taxpayers..... 8

b. Major uncertainty over the issue concerns the state legislatures 10

c. The issue is of tremendous importance to the operation of the nationwide market for municipal bonds..... 11

B. As Explicit Discrimination Against Commerce To Center Or Corner The Market For Municipal Bond Purchasers, The Discriminatory Tax Is Per Se Invalid And Lacks Any Saving Purpose Unrelated To Economic Protectionism 11

C. Differential Taxation Of Interstate Interest Has Been Addressed And Rejected By The Only Authorities Addressing The Issue..... 13

D. The Invalidity Of Ohio R.C. 5747.01(A)(1) Is The Next Obvious Step In This Court's Eradication Of Balkanizing State Tax Provisions 15

E. The State Court's Creation Of A New "Sovereign Interest" Exemption To Commerce Clause Scrutiny Is Repugnant To This Court's View Of An Internally Borderless Nation 17

TABLE OF CONTENTS—Continued

Page

II. STATES, ESPECIALLY THOSE ALREADY AFFORDING JURISDICTION FOR DECLARATORY RELIEF AGAINST FACIALLY INVALID TAX PROVISIONS, ARE BOUND BY THE SUPREMACY CLAUSE AGAINST REFUSING TO EXERCISE THEIR JURISDICTION TO ENTERTAIN THOSE CLAIMS UNDER 42 U.S.C. § 1983 19

CONCLUSION 24

TABLE OF AUTHORITIES

CASES — Page

Aronson v. Commonwealth, 401 Mass. 244, 516 N.E.2d 137 (1987) 20
Baldwin v. Seelig, Inc., 294 U.S. 511 (1935) 15
Bloomingdale's by Mail Ltd. v. Huddleston, 848 S.W.2d 52 (Tenn. 1992) *cert. denied*, 113 S.Ct. 3002 (June 21, 1993) 21
Bonaparte v. Tax Court, 104 U.S. 592 (1881) 10
Boston Stock Exch. v. State Tax Comm., 429 U.S. 318 (1977) 13, 14, 20
C & A Carbone, Inc. v. Clarkstown, 114 S.Ct. 1677 (1994) 14, 16, 18
Chemical Waste Management Inc. v. Hunt, 504 U.S. 334 (1992) 16
City of Burlington v. Dague, 112 S.Ct. 2638 (1992) 22
Colgate v. Harvey, 296 U.S. 404 (1935) 13
Davis v. Michigan Dept. of Treasury, 489 U.S. 803 (1989) 21, 22
Dean Milk Co. v. Madison, 340 U.S. 349 (1951) 15
Dennis v. Higgins, 111 S.Ct. 865 (1991) 20
Dept. of Revenue v. Kuhnlein, 646 So.2d 717 (Fla. 1994) 22
Dominion National Bank v. Olsen, 771 F.2d 108 (6th Cir. 1985) 13, 14
Fair Assessment in Real Estate v. McNary, 454 U.S. 100 (1981) 20, 21
Fort Gratiot Landfill v. Mich. Dept. of Nat. Res., 504 U.S. 353, 112 S.Ct. 2019 (1992) 16
Fulton Corp. v. Justus, 338 N.C. 472, 450 S.E.2d 728 (1994), *cert. granted sub nom. Fulton Corp. v. Faulkner*, 1995 WL 23498, 63 U.S.L.W. 3564 (April 17, 1995) 17
Hafer v. Melo, 502 U.S. (1991) 20
Harper v. Virginia Dept. of Taxation, 113 S.Ct. 2510 (1993) 21
Howlett v. Rose, 496 U.S. 356 (1990) 19, 20, 21
H.P. Hood & Sons, Inc. v. DuMond, 336 U.S. 525 (1949) 20

TABLE OF AUTHORITIES—Continued

Page

L.L. Bean, Inc. v. Fred Bracey, 817 S.W.2d 292 (Tenn. 1991) 21
Maine v. Thiboutot, 448 U.S. 1 (1980) 23
Maryland v. Louisiana, 451 U.S. 725 (1981) 14
Mondou v. New York, N.H. & H.R. Co., 223 U.S. 1 (1912) 20
National Private Truck Council v. Oklahoma Tax Comm., 879 P.2d 137 (S.Ct. Okla. 1994), *cert. granted* 63 U.S.L.W. 3429; schedule set 63 U.S.L.W. 3471 ..... 17, 19, 22
New Energy Co. of Indiana v. Limbach, 486 U.S. 269 (1988) 12
Oklahoma Tax Commission v. Jefferson Lines, Inc., —— U.S. ——, 63 U.S.L.W. 4233 (1995) .. 17
Oregon Waste Systems Inc. v. Dept. of Environmental Quality, 114 S.Ct. 1345 (1994) 11, 13, 14, 16
Philadelphia v. New Jersey, 437 U.S. 617 (1978) .. 16
Pike v. Bruce Church, Inc., 397 U.S. 137 (1970) .. 12
Radio Common Carriers of New York, Inc. v. State of New York, 601 N.Y.S.2d 513 (1993) 22
Reich v. Marcus E. Collins, 115 S.Ct. 547 (1994) 21
Republic of Argentina v. Weltover, 112 S.Ct. 2160 (1992) 19
Rowan Companies, Inc. v. Louisiana State Tax Commission, 623 So.2d 159 (La. 1993) 22
State ex rel. Hanson v. Quill Corp., 500 N.W.2d 196 (N.D. 1993) 21
State ex rel. Tracy v. Franklin County Court of Common Pleas, 66 Ohio State 3d 644, 614 N.E.2d 1047 (1993) 23
United States v. California, 297 U.S. 175 (1936) .. 19
Wyoming v. Oklahoma, 502 U.S. 437 (1992) 12

CONSTITUTIONAL PROVISIONS AND STATUTES

Commerce Clause of the United States Constitution, Article I, Section 8 ..... *passim*
Supremacy Clause of the United States Constitution, Article VI, Clause 2 ..... 7, 19, 23

TABLE OF AUTHORITIES—Continued

Page

42 U.S.C. § 1983 ..... *passim*
Ohio Constitution, Article VIII, §§ 2b, 2c, 2d, 2f, 2g, 2i, 2j, 2k, 2l 3, 4
Ohio Revised Code § 5747.01(A)(1) 3, 5, 6, 12, 15
Ohio Revised Code § 5709.76 3

OTHER AUTHORITIES

Fund Directions: Vital News for Informed Trustees and Directors, Volume Three, Number One, p. 1, January 1994 9
Thomas T. Vogel, *Ohio Suit Threatens Tax Advantages of Buying Single-State Muni Funds and In-State Bonds*, The Wall Street Journal, December 14, 1993 at C19 ..... 8, 9, 10, 11
Karen Pierog, *Ohio's Tax on Out-of-State Bonds Spurs Suit That Worries Industry*, The Bond Buyer, September 9, 1993 at Page 1, Column 3.. 8, 11
Cris Carmody, *Proposed Minnesota Bill Would Tax Interest From State, Local Bonds*, The Bond Buyer, March 2, 1995 at Page 1, Column 2.. 10

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OPINIONS BELOW

The November 12, 1993 decision of the Court of Common Pleas, Franklin County, Ohio, case number 93CVH-11-9271, has not been officially reported and is set out in Appendix D at 13a.

The September 29, 1994 opinion of the Court of Appeals of Ohio, affirming summary judgment to the defendants is reported at 97 Ohio App.3d 760 (Ohio App. 10 Dist. 1994), and is set out in Appendix B at 2a.

The Supreme Court of Ohio's March 1, 1995 Order declining jurisdiction to hear this case is set out in Appendix A at 1a.

JURISDICTION

The Ohio Court of Appeals affirmed summary judgment on September 29, 1994. On March 1, 1995, the Supreme Court of Ohio declined jurisdiction to hear this case. This Court's jurisdiction is invoked under 28 U.S.C. § 1257.

CONSTITUTIONAL, STATUTORY AND OTHER PROVISIONS INVOLVED

The Commerce Clause of the United States Constitution, Article I, Section 8, provides:

> The Congress shall have Power . . .
>
> To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes. U.S.C.A. Const. Art. I § 8, cl. 3.

The Supremacy Clause of the United States Constitutions, Article VI, Clause 2, provides:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby; any Thing in the Constitution or Laws of any State to the Contrary notwithstanding. U.S.C.A. Const. Art. VI, cl. 2.

42 U.S.C. § 1983 (1994) provides, in pertinent part:

> Every person who, under the color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Ohio R.C. § 5747.01(A)(1) provides, in pertinent part:

> § 5747.01 Definitions. . .
>
> As used in this chapter:
>
> (A) "Adjusted gross income" means adjusted gross income as defined and used in the Internal Revenue Code, adjusted as follows:
>
> (1) Add interest or dividends on obligations or securities of any state or of any political subdivision or authority of any state, other than this state and its subdivisions and authorities; . . . Ohio R.C. § 5747.01(A)(1).

Ohio R.C. § 5709.76 provides, in pertinent part:

> § 5709.76 Exemption of public obligations.
>
> (A) All of the following are exempt from taxes levied by the state and its subdivisions:
>
> (1) Public obligations;
>
> (2) Interest or interest equivalent on public obligations and on purchase obligations;
>
> (3) The transfer, and any profit made on the sale, exchange, or other disposition, of public obligations. . . . Ohio R.C. § 5709.76.

The following provisions of the **Ohio Constitution** additionally exempt certain items of specific Ohio bond interest from taxation:

Art. VIII, § 2b	Adjusted compensation for service in World War II.
Art. VIII, § 2c	Construction of state highway system.
Art. VIII, § 2d	Korean War bonus.
Art. VIII, § 2f	Authorizing bond issue to provide school classrooms, support for universities, for recreation and conservation and for state buildings.

Art. VIII, § 2g	Authorizing bond issue or other obligations for highway construction.
Art. VIII, § 2i	Capital improvement bonds.
Art. VIII, § 2j	Vietnam conflict compensation fund.
Art. VIII, § 2k	Issuance of general obligations of the state to finance local government public infrastructure capital improvements.
Art. VIII, § 21	Parks, recreation, and natural resources project capital improvements.

STATEMENT OF THE CASE

This appeal presents two pure legal issues in a Commerce Clause challenge to Ohio's discriminatory income taxation of only out-of-state municipal bond interest income, while exempting the interest on Ohio-issuer bonds.

Petitioner seeks review of the Ohio appellate court's affirmance of the trial court's grant of summary judgment to defendant state officials, and denial of plaintiff's motion for summary judgment, in its view that: (1) the negative Commerce Clause does not limit a State's discriminatory actions done to benefit its own local "public" or "sovereign" interests, as distinct from local *private* interests, and (2) state taxpayers challenging the facial constitutionality of a state income tax provision in a declaratory action permitted by state law may not assert a count under 42 U.S.C. § 1983.

The Declaratory Proceedings Below. Petitioner Serene G. Shaper, an Ohio resident owner of municipal bonds issued by out-of-Ohio municipalities, sued, under Ohio's Declaratory Action provisions, R.C. 2721.02 and 42 U.S.C. § 1983, for declaratory and injunctive relief, asserting that Ohio's discriminatory income taxation of out-of-state-sourced municipal income, while exempting interest on Ohio-issued municipal bonds, on its face violates

the Commerce Clause of the United States Constitution as pure discrimination against items in Commerce.

Petitioner moved for class certification and for summary judgment that R.C. § 5747.01(A)(1)'s discriminatory taxation scheme violates the Commerce Clause.

The defendant state officials ("defendants") cross-moved for summary judgment, asserting (1) that provision to benefit State *public*, rather than *private*, interests does not discriminate against commerce, but even so, that it is permitted by either the "market participant" exception or the notion that the Commerce Clause does not apply to limit state actions done to benefit local public (as distinct from private) interests, (2) that Ohio law should not permit petitioner to challenge the provisions by a declaratory action, and (3) that petitioner should not be permitted to pursue her action under 42 U.S.C. § 1983.

In a decision dated November 12, 1993 (Judgment entered December 7, 1993), Franklin County Common Pleas Judge Evelyn J. Stratton upheld the taxpayer's right under Ohio law to bring a declaratory action challenging a state tax provision as unconstitutional on its face without requiring her to first exhaust her administrative remedies for past tax years, but struck the § 1983 count holding that the action could not be pursued under 42 U.S.C. § 1983 in addition to her state law remedies. However the Court then granted summary judgment to the state, ruling that Ohio's discriminatory income taxation of only out-of-state municipal income is exempt from Commerce Clause scrutiny for two reasons: (1) that the discrimination is protected by the "market participant" exception (since it was imposing a tax to assist in its sales of its own bonds) and (2) that the Commerce Clause does not apply to limit state actions done to further the state's *own* interests, as distinct from Ohio private business interests. The court thus never reached the issue of class certification, finding it moot by her grant of judgment on the merits.

Appeal to the Ohio Appellate Court. The appellate court affirmed on the second substantive ground. The court held that the "market participant" exception does not apply, since the state of Ohio, in assessing taxes, acts as a market *regulator*, not a market *participant*. However, the court nonetheless affirmed, agreeing that the Commerce Clause was not intended to apply to acts of a sovereign acting for its *own* behalf, to provide the taxing state with a competitive advantage over another sovereign. In light of its holding the tax statute constitutional, it found the § 1983 issue moot.

On November 14, 1994, Petitioner filed a Notice of Appeal and Memorandum in Support of Jurisdiction with the Supreme Court of Ohio, presenting two pure questions of law: 1) the constitutionality of the Ohio income tax provision, R.C. § 5747.01(A)(1), which taxes the interest on obligations issued by non-Ohio governmental entities while exempting any interest received on obligations issued by Ohio governmental issuers, and 2) the ability of individuals to use 42 U.S.C. § 1983 as one of their causes of action in a declaratory action challenging a facially unconstitutional State tax provision.

On March 1, 1995, the Supreme Court of Ohio declined jurisdiction to hear this case and dismissed the appeal and the cross-appeal. Petitioner now seeks certiorari from this Court in order to present these two issues of extreme importance and timeliness, faced by virtually every State, and on which the State legislatures need guidance and the State courts are unable to act impartially.

A. Introduction

This appeal presents two pure questions of federal constitutional law: 1) whether Ohio's explicit discriminatory income taxation of the municipal [1] interest on

[1] For these purposes, the term "municipal" refers to all units and subdivisions of State and local governments.

bonds issued by non-Ohio governmental entities, while exempting all such interest on bonds issued by Ohio municipalities violates the Commerce Clause, or is exempt from scrutiny because the discrimination is to benefit local "public" (rather than private) interests, and 2) whether a State, especially one which already affords state court jurisdiction to a declaratory action challenging a facially unconstitutional State tax provision, may refuse to permit the challenger to assert 42 U.S.C. § 1983 as one of their causes of action.

B. Overview of Argument

Ohio's taxation of the interest on non-Ohio municipal bonds while exempting any interest received on Ohio municipal bonds is prohibited by the Commerce Clause as an explicit discrimination against items in interstate commerce. The creation of a new "sovereign interest" exemption to the Commerce Clause by the court below, permitting discrimination intended to benefit local "public" interests (as distinct from local *private* interests) conflicts with the decisions of this Court and all other reported authorities. This is an issue of enormous importance regarding the legality of state-erected barriers to the nationwide municipal bond market presented by the tax statutes in 37 states, and with respect to which any one State's legislature or courts cannot impartially eliminate, except to their competitive disadvantage.

A state court violates the Supremacy Clause in refusing to entertain counts under 42 U.S.C. § 1983 for claims already properly before it as a declaratory action against a facially invalid statute.

REASONS FOR GRANTING THE PETITION

I. A STATE'S DISCRIMINATORY INCOME TAXATION OF INTEREST ON OTHER STATES' MUNICIPAL BONDS, WHILE EXEMPTING INTEREST ON IN-STATE BONDS, IS AN EXPLICIT DISCRIMINATION AGAINST INTERSTATE COMMERCE, AND IS NOT EXEMPTED FROM COMMERCE CLAUSE SCRUTINY BECAUSE ITS PURPOSE IS TO BENEFIT THE STATE'S SOVEREIGN INTEREST, AS DISTINCT FROM LOCAL PRIVATE INTERESTS.

A. This Is An Issue Of Overwhelming Importance:

(1) to the states, because this type of statutory discrimination exists in 37 states;

(2) to the state courts and legislatures, who are themselves uncertain about its constitutionality and are unable to dispassionately adjudicate and resolve the issue; and

(3) to the nationwide municipal bond market, since it would eradicate the current state barriers to the nationwide flow of municipal bonds.

As already recognized by the major financial journals,[2] this case presents an issue of vast importance to the public, to State governments and to the municipal bond markets nationwide.

a. *This issue is of overwhelming importance to the states and their taxpayers.*

Thirty-seven other states have provisions similarly taxing municipal interest on only out-of-state bonds.[3] The

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[2] *See Articles*: Pierog, "Ohio's Tax on Out-of-State Bonds Spurs Suit That Worries Industry", *The Bond Buyer*, September 9, 1993 at Page 1, Column 8 (Appendix H at 34a); "Ohio Suit Threatens Tax Advantages of Buying Single-State Municipal Funds and In-State Bonds"; *Wall Street Journal*, December 14, 1993 at C6 (Appendix G at 31a).

[3] ALA. CODE § 40-18-14(2)(d), (f), 40-18-14(3) (1994), ARIZ. REV. STAT. ANN. § 43-1021(4) (1995), ARK. CODE ANN. § 26-51-

financial community has recognized both the local interests protected by the obvious discrimination and the national market benefits of nationwide marketability for each state's bonds.[4]

404(b)(6) (1994), CAL. REV. & TAX CODE § 17133 (1995), COLO. REV. STAT. § 39-22-104(3)(b) (1995), CONN. GEN. STAT. ANN. § 12-505(a)(4)(B) (1995), DEL. CODE ANN. tit. 30, § 1106(a)(1) (1994), GA. CODE ANN. § 48-7-27-(b)(1)(A) (1994), HAW. REV. STAT. § 235-7(a)(5), (b)(2) (1994), IDAHO CODE § 63-3022(a) (1994), KY. REV. STAT. ANN. § 141.010(10)(c) (1995), LA. REV. STAT. ANN. § 47:293(6) (1995), ME. REV. STAT. ANN. tit. 36, § 5122(1)(A) (1994), MD. ANN. TAX. GEN. CODE § 10,203, 10-204(b) (1957), MASS. GEN. LAWS ANN. ch. 62, § 1, 2(a)(1)(A) (1995), MICH. STAT. ANN. § 206.301)(a) (1995), MINN. STAT. ANN. § 290.01(19a)(1)(i) (1995), MISS. CODE ANN. § 27-7-15(4)(d) (1994), MO. ANN. STAT. § 143.121(2)(b) (1995), MONT. CODE ANN. § 15-30-111(1)(a) (1993), NEB. REV. STAT. § 77-2716(1)(a), (b), (c) (1994), N.H. REV. STAT. ANN. § 77:4(1) (1993), N.J. REV. STAT. § 54A:6-14 (1995), N.M. STAT. ANN. § 7-2-2(V) (1994), N.Y. TAX LAW § 612(b)(1) (1995), N.C. GEN. STAT. ANN. § 105-134.6(c)(1) (1994), N.D. CENT. CODE ANN. § 57-38-01.2(1)(g) (1993), OHIO REV. CODE ANN. § 5747.01(A)(1) (1991), OKLA. STAT. ANN. tit. 68, § 2358(A)(1) (1995), OR. REV. STAT. ANN. § 316.680(2)(a) (1994), PA. CONST. STAT. ANN. tit. 72, § 7303(a)(3), (6) (1995), R.I. GEN. LAWS § 44-30-12(b)(1) (1994), S.C. CODE. ANN. § 12-7-430(b)(1) (1993), TENN. CODE ANN. § 67-2-104(e) (1994), VT. STAT. ANN. tit. 32, § 5811(1) (1994), VA. CODE ANN. § 58.1-322(B)(1) (1994), W. VA. CODE ANN. § 11-21-12(b)(1) (1994).

Based just on this discriminatory tax treatment, there are literally trillions of dollars invested in in-state municipal bonds and single-state municipal bond funds marketed to residents of the tax-discriminatory states. *Fund Directions: Vital News for Informed Trustees and Directors*, Volume Three, Number One at 1, January 1994.

[4] *See e.g.*, Thomas T. Vogel, Jr., *Ohio Suit Threatens Tax Advantages of Buying Single-State Muni Funds and In-State Bonds*, The Wall Street Journal, December 14, 1993 at C19. Richard Lehmann, president of the Bond Investors Association, noted, "[s]uch taxing practices give some states a certain advantage in the municipal-bond market at the expense of other states. States with low taxes and a small population, for example, see the demand for their bonds weakened when larger states with higher taxes levy taxes on the

Nonetheless, a fair resolution of this issue is impossible, except by this Court. The Eleventh Amendment's underpinnings require that this case (and any others elsewhere) be initiated in the State courts. But each State's courts are effectively bound to uphold the discrimination, since finding their own statutory discrimination invalid, puts their State at a competitive disadvantage with the other discriminating states,[5] over whose tax provisions they have no jurisdiction.[6]

b. *Major uncertainty over the issue concerns the state legislatures.*

Explicitly due to concern about this issue in this case,[7] legislation has been proposed in at least one other State (Minnesota) to anticipate the result of this case by eliminating its own tax exemption for its state and local bonds, joining the five states that already tax interest income on most of their own bonds—Illinois, Iowa, Kansas, Oklahoma and Wisconsin.[8]

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income from the smaller states' bond issues. A legal precedent that prevented states from taxing the income from municipal bonds of other states could help boost demand for such low tax states . . . It may be good for the municipal market because it could improve the liquidity." (Appendix G at 32a).

[5] Richard Lehmann, president of the Bond Investors Association, recognized that "[t]his is something that will never be favorably ruled on at the state level . . . it does have to go to the Supreme Court." Thomas T. Vogel, *Ohio Suit Threatens Tax Advantages of Buying Single-State Muni Funds and In-State Bonds*, The Wall Street Journal, December 14, 1993 at C19 (Appendix G at 32a).

[6] *See Bonaparte v. Tax Court*, 104 U.S. 592 (1881).

[7] A Minnesota House legislative analyst stated that the bill was proposed to head off liability that might arise from this lawsuit in the Ohio courts. Cris Carmody, *Proposed Minnesota Bill Would Tax Interest From State, Local Bonds*, The Bond Buyer, March 22, 1995 at Page 1, Column 2 (Appendix I at 38a).

[8] But even those states present some form of discrimination. For example, Illinois also exempts certain specific Illinois issues by statutes unique to those bonds. 35 ILCS 5/203(a)(2)(A).

The states are thus obviously recognizing the impropriety of this practice. However, without direction from this Court, each state is constrained against legislatively or judicially dropping its discriminatory taxation to its competitive disadvantage as long as other states' discriminatory tax barriers remain in place.

c. *The issue is of tremendous importance to the operation of the nationwide market for municipal bonds.*

The financial journals have already noted the importance of the issue and the likely correctness of Petitioner's argument.[9] If petitioner prevails, *all* municipal bonds would become marketable nationwide, and all single-state bond funds would be immediately obsolete, or opened nationwide. Indeed the State legislatures are grappling with the issue, but each is similarly constrained against cutting off a discriminatory revenue source while others continue discriminating.

B. As Explicit Discrimination Against Commerce To Center Or Corner The Market For Municipal Bond Purchasers, The Discriminatory Tax Is Per Se Invalid And Lacks Any Saving Purpose Unrelated To Economic Protectionism.

As described in *Oregon Waste Systems Inc. v. Dept. of Environmental Quality*, 114 S.Ct. 1345 (1994), a State statutory provision which discriminates *on its face* [10] against interstate commerce is subjected to a nearly *per se* rule of invalidity: No balancing is done. *Oregon Waste Systems Inc.*, 114 S.Ct. 1345 (1994). There is no need to prove the volume of commerce affected.

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[9] *See Articles*: Pierog, "Ohio's Tax on Out-of-State Bonds Spurs Suit That Worries Industry", *The Bond Buyer*, September 9, 1993 at Page 1, Column 3 (Appendix H at 34a); "Ohio Suit Threatens Tax Advantages of Buying Single-State Municipal Funds and In-State Bonds", *Wall Street Journal*, December 14, 1993 at C6 (Appendix G at 31a).

Wyoming v. Oklahoma, 502 U.S. 437, 112 S.Ct. 789 (1992).[11] The statute is viable only if the discrimination is demonstrably justified by a valid factor unrelated to economic protectionism. *New Energy Co. of Indiana v. Limbach*, 486 U.S. 269, 274 (1988).[12]

Admittedly motivated solely by protectionist purposes to "center" or monopolize the Ohio bond market for Ohio municipal issuers, R.C. § 5747.01(A)(1) taxes the interest on government obligations based solely upon the out-of-state origin of those obligations. The provision thus discriminates *on its face* against items in commerce.[13]

Tax provisions do not obtain any special priority in Commerce Clause scrutiny. State tax provisions are subject to the same Commerce Clause limitations as other state regulations. The States' broad discretion to configure their taxation systems as they deem appropriate, has long been "bounded by any relevant limitations of the

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[10] Facially non-discriminatory provisions are instead reviewed under the so-called *Pike* test, *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970), upholding the regulation unless the burden imposed on commerce is clearly excessive in relation to the putative local benefits.

[11] "Where discrimination is patent, as it is here, neither a widespread advantage to in-state interests nor a widespread disadvantage to out-of-state competitors need be shown." *New Energy Co. of Indiana v. Limbach*, 486 U.S. at 274.

[12] Invalidating Ohio's discriminatory sales tax on sales of ethanol, which exempted sales of ethanol produced from Ohio (or states which grant reciprocal tax exemption or benefits for Ohio-produced ethanol), holding that the "negative" or "dormant" aspect of the Commerce Clause prohibits economic protectionism—that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors. *Id.* at 273.

[13] As the trial Judge Stratton noted in the September 13, 1993 proceedings: "What other intent could be intended?" (Appendix F at 28a). Indeed, defendants' counsel Pratt acknowledged: "That is economic protectionism. That is the life blood of the sovereign itself. That is a government function." (Appendix F at 29a).

Federal Constitution, in this case the negative Commerce Clause." *Oregon Waste*, 114 S.Ct. at 1347.[14] Once viewed from a Privileges and Immunities perspective, this Court has consistently invalidated state tax discrimination against income received from other states. *Colgate v. Harvey*, 296 U.S. 404, 430ff (1935). More recently, that virtually per se rejection of discriminatorily taxing income from commerce has resided in the so-called "negative" or "dormant" Commerce Clause.

C. Differential Taxation Of Interstate Interest Has Been Addressed And Rejected By The Only Authorities Addressing The Issue.

The legality of differentially taxing interstate income has been definitively addressed and rejected in one reported case. In *Dominion National Bank v. Olsen*, 771 F.2d 108, 111 (6th Cir. 1985), the Sixth Circuit invalidated Tennessee's tax upon earnings from certificates of deposit issued by out-of-state financial institutions while exempting such earnings received from Tennessee banks. Following this Court's clear Commerce Clause lead, the Sixth Circuit held that the statute invalidly discriminated against commerce by "providing a direct commercial advantage" to Tennessee financial institutions over out-of-state financial institutions, by inducing Tennessee residents to invest in certificates of deposit

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[14] In *Boston Stock Exch. v. State Tax Comm.*, 429 U.S. 318 (1977), this Court invalidated a New York State transfer tax provision imposing a higher rate upon outside New York transfers of NYSE-listed shares whose "obvious effect" was to force the trading of New York-listed stocks to occur in New York. Because the discriminatory tax "foreclose[d] tax neutral decisions and create[d] both an advantage for the exchanges in New York and a discriminatory burden on commerce to its sister states," a unanimous Supreme Court struck the provision, concluding: "[t]his diversion of interstate commerce and diminution of free competition in securities sales are wholly inconsistent with the free trade purpose of the Commerce Clause." *Id.* at 335.

issued by in-state rather than out-of-state banks. *Id.* (quoting *Boston Stock Exchange*, 429 U.S. at 329).[15]

The State's admitted sole avowed purpose here—to "center" (corner) the market for Ohio public sector bonds in Ohio and those of other states in their own respective states—is pure economic protectionism. To erect barriers in the Ohio market against the entry of other states' bonds, and to encourage the other states to erect similar walls around their own resident investors, bespeaks a pernicious Balkanizing concept that is at odds with an efficient and effective national economy. *See also Oregon Waste Systems, Inc. v. Dept. of Environmental Quality, supra* 114 S.Ct. 1345 (1994); *C & A Carbone, Inc. v. Clarkstown*, 114 S.Ct. 1677 (1994).

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[15] The Court also rejected *Dominion National Bank* defendants' argument to distinguish *Boston Stock Exchange* as a direct tax upon an interstate securities transfer transaction, from *Boston Stock Exchange's* tax upon local receipt of income derived from an interstate transaction. *Id.* at 118 (Contie, J., concurring). The court was not convinced. Relying primarily on *Maryland v. Louisiana*, 451 U.S. 725 (1981), the court indicated that "[i]n each case it is our duty to determine whether the statute under attack, whatever its name may be, will in its practical operation work discrimination against interstate commerce." *Dominion Nat'l. Bank*, 771 F.2d at 111 (quoting *Maryland v. Louisiana*, 451 U.S. at 756); *see also Id.* at 118 (Contie, J., concurring) ("[T]he fact that the challenged tax is assessed against receipt of income in Tennessee rather than against an interstate transaction . . . is irrelevant").

The Court also rejected, the *Dominion* defendants' argument that the tax differential was justifiable as a measure to compensate for Tennessee's inability to apply to out-of-state banks the Tennessee tax laws and banking regulations under which the Tennessee banks must operate. *Id.* at 111. The court was similarly unpersuaded, "[t]he common thread running through the cases upholding compensatory taxes is the equality of treatment between local and interstate commerce. . . . We find no such equality of treatment in our instant case." *Id.*, quoting *Maryland v. Louisiana*, 451 U.S. at 759.

D. The Invalidity Of Ohio R.C. 5747.01(A)(1) Is the Next Obvious Step In This Court's Eradication Of Balkanizing State Tax Provisions.

This Court has long rejected state efforts to Balkanize the nation by erecting barriers against the movement of goods across state lines. Early Commerce Clause cases invalidated state regulations on milk sales whose necessary effect was to protect state producers.[16] Recent Commerce Clause decisions, rejecting state arguments that garbage is not a protectable item of commerce, have routinely "trashed" state-erected taxes and other regulatory barriers to the "free flow" of garbage across state

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[16] *Baldwin v. Seelig, Inc.*, 294 U.S. 511 (1935), invalidated the New York Milk Control Act's prohibition of retail sales in New York of out-of-state milk, if the milk had been purchased at a lower price than the Act's minimum "set" price for sales by New York producers. *Id.* This Court held that the Act's operation unconstitutionally "set a barrier to traffic between one state and another as effective as if custom duties, equal to the price differential, had been laid upon the [goods]." *Id.* at 521, *Id.* at 499. This Court rejected New York's argument that its regulation was justified by the need to assure a regular and adequate supply of milk—that if farmers could not earn a living wage from producing milk, the resulting lack of milk supplies would endanger public health—since that rational would apply to *all* cases of state-enacted trade barriers to protect its own industry. *Id.* at 523, *Id.* at 500.

In *Dean Milk Co. v. Madison*, 340 U.S. 349 (1951), this Court invalidated a Madison, Wisconsin ordinance prohibiting the sale of any milk as pasteurized unless it had been processed at a plant "within a radius of five miles from the central square of Madison." Similarly, this Court found that ordinance erected an economic barrier protecting a major local industry against competition from without the state, plainly discriminating against interstate commerce. *Id.* at 354, *Id.* at 298. Dispatching the city's argument that the regulation might have been motivated by bona fide safety and health concerns to enable easy inspection of pasteurization quality control to guard against the sale of adulterated milk, rather than a protectionist goal, this Court found the regulation nonetheless invalidly discriminated against interstat ecommerce. *Id.*

lines and have invalidated as impermissible protectionism discriminatory provisions.[17] In each case, this Court held that the local government's benign desire to either preserve its resources, generate revenues, or finance worthwhile projects could not be legitimately accomplished by constructing barriers to the free flow of interstate trade.

The timeliness of this issue is underscored by this Court's repeated expression of its continued appetite for Commerce Clause cases, its acceptance of uniform state taxes which do not discriminate against commerce, and its unyielding distaste for protectionist taxes. Upholding a sales tax imposed at a uniform rate upon the sale of bus tickets for travel, regardless of whether the trip is interstate or purely intrastate, Justice Souter spoke for

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[17] The Court thus invalidated provisions that: (a) prohibited the inflow of imported waste for disposal (*Philadelphia v. New Jersye*, 437 U.S. 617 (1978)); imposed higher dump tax rates (*Chemical Waste Management Inc. v. Hunt*, 504 U.S. 334 (1992)); or imposed more difficult permit requirements (*Fort Gratiot Landfill v. Mich. Dept. of Nat. Res.*, 504 U.S. 353 (1992)), on incoming "imported" toxic waste; or (b) conversely erected statutory "flow control" walls to prevent the *outflow* of garbage and capture its processing (and thus the incidental processing fees) to secure the financing for construction and acquisition of a municipal waste treatment plant. (*C & A Carbone, Inc. v. Clarkstown*, 114 S.Ct. 1677 (1994)). And although *Chemical Waste* reserved decision on whether a state might be permitted to impose a surcharge to reflect the actual cost differential in disposing of income toxic waste, *Id.*, this Court sealed that "opening" shut two terms later in *Oregon Waste Systems Inc. v. Dept. of Environmental Quality*, 114 S.Ct. 1345 (1994). Justice Thomas' opinion for the 7-2 majority rejected Oregon's differential surcharge on incoming garbage as not a "compensatory" tax since the state could not show that it cost more to deal with imported garbage than to handle domestic garbage. Since the surcharge was discriminatory on its face, the virtually per se rule of invalidity provided the proper legal standard, and the provision was unsalvageable because the State could not meet its burden to show a legitimate local purpose that could not be adequately served by reasonable nondiscriminatory alternatives. *Id.*

the Court of the Framers' view of an internally borderless nation:

> . . . We have understood this construction to serve the Commerce Clause's purpose of preventing a State from retreating into economic isolation or jeopardizing the welfare of the Nation as a whole, as it would do if it were free to place burdens on the flow of commerce across its borders that commerce wholly within those borders would not bear. The provision thus reflects a central concern of the Framers that was an immediate reason for calling the Constitutional Convention: the conviction that in order to succeed, the new Union would have to avoid the tendencies toward economic Balkanization that had plagued relations among the colonies and later among the States under the Articles of Confederation. *Oklahoma Tax Commission v. Jefferson Lines, Inc.*, —— U.S. ——, 63 U.S.L.W. 4233, 4234 (decided April 3, 1995).

On April 17, 1995, this Court granted certiorari to review North Carolina's imposing its intangibles tax at a lower rate on stock issued by companies who do business within the state. *Fulton Corp. v. Justus*, 338 N.C. 472, 450 S.E.2d 728 (1994), *cert. granted sub nom. Fulton Corp. v. Faulkner*, 1995 WL 23498, 63 U.S.L.W. 3564 (April 17, 1995). The next day it heard argument over Oklahoma's refusal to grant federal remedies to persons who have successfully challenged state taxes which violate the Commerce Clause. *National Private Truck Council v. Oklahoma Tax Comm.*, 879 P.2d 137 (S.Ct. Okla. 1994), *cert. granted* 63 U.S.L.W. 3429; Schedule set 63 U.S.L.W. 3471.

E. The State Court's Creation Of A New "Sovereign Interest" Exemption To Commerce Clause Scrutiny Is Repugnant To This Court's View Of An Internally Borderless Nation.

The opinion below, created a "sovereign interest" exemption—that the Commerce Clause does not limit a

state or other sovereign acting in its *own* interest, even though it does prohibit discriminatory actions to favor local private interests—which does not exist and is repugnant to this Court's body of Commerce Clause decisions.

While much of the existing body of Commerce Clause decisions invalidate local tax provisions that were intended to benefit local *private* interests, the Court has never entertained nor anywhere implied the notion that a State may discriminate against commerce to prefer or favor its own interests. Presuming that a State is *always* acting for what it perceives as the public interest, Commerce Clause limitations on State activity may be viewed as having been imposed on a sovereign acting for its own public interest, or that of its citizens.

Indeed, in *C & A Carbone, Inc. v. Clarkstown*, 114 S.Ct. 1677 (1994), the Court squarely rejected the minority argument that the Commerce Clause should not preclude a state's use of its regulatory powers to benefit its own (as distinct from its private citizens') commercial interest. The local "flow control" ordinance at issue there prohibited the outflow of local garbage, requiring it to be processed at a local governmental facility, in order to ensure adequate "tipping fee" revenue to finance construction and the local government's acquisition of the waste facility for itself.

Nor did this Court overlook that issue, of whether a state may discriminate in favor of itself, as distinct from the prohibition against it doing so for local *private* interests. Justice Souter's minority dissent squarely argues that the discrimination should have been permitted, precisely *because* "the one favored facility is a governmental facility." *Carbone*, 114 S.Ct. 1677 (1994) (Souter, J., dissenting). The "sovereign" exemption was thus recognized but rejected.

There no reported decision (except the decision below) permitting a State to discriminatorily tax to benefit its

own direct "sovereign" or entity interests. Furthermore, the decisions are uniformly hostile to any exemption for any sovereigns, states or nations from the Commerce Clause.[18]

II. STATES, ESPECIALLY THOSE ALREADY AFFORDING JURISDICTION FOR DECLARATORY RELIEF AGAINST FACIALLY INVALID TAX PROVISIONS, ARE BOUND BY THE SUPREMACY CLAUSE AGAINST REFUSING TO EXERCISE THEIR JURISDICTION TO ENTERTAIN THOSE CLAIMS UNDER 42 U.S.C. § 1983.

The Supremacy Clause prohibits the state courts having already determined to exercise jurisdiction under state declaratory provisions, to refuse to entertain assertable federal causes of action in the State courts.[19] A very similar variant to this particular issue has been argued and is presently awaiting decision by this Court in *National Private Truck Council, Inc. v. Oklahoma Tax Commissioner*, No. 94-688, argued April 18, 1995.

State and Federal courts have concurrent jurisdiction over § 1983 cases, and the Supremacy Clause binds the state courts not to thwart the action by declining their jurisdiction. *Howlett v. Rose*, 496 U.S. 356 (1990).

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[18] In *United States v. California*, 297 U.S. 175 (1936), a state-operated railroad was fully subject to regulation by Congress acting within the Commerce Clause:

> "The State can no more deny the [Congress' plenary Commerce Clause] power if its exercise has been authorized by Congress than can an individual." 297 U.S. at 185.

(*See also Republic of Argentina v. Weltover*, 112 S.Ct. 2160 (1992) holding Argentina as a bond issuer to be subject to U.S. federal securities laws passed under the Commerce Clause).

[19] Indeed, the court's determination below, that Petitioner's right to have those claims adjudicated or to have the class certified must await a prior decision on whether they can prove entitlement to prevail on the merits—reverses the order prescribed by all federal and state court rules.

"The existence of the jurisdiction," a unanimous Supreme Court reminded, "creates an implication of duty to exercise it." *Howlett*, 496 U.S. at 369-370 (quoting *Mondou v. New York, N.H. & H.R. Co.*, 223 U.S. 1, 58 (1912)). And § 1983 may be used to assert Negative Commerce Clause claims. *Dennis v. Higgins*, 111 S.Ct. 865, 873 (1991). *Dennis* recognized both the right "to engage in interstate commerce free of discriminatory taxes," *id.* at 871 (quoting *Boston Stock Exchange v. State Tax Comm'n.*, 429 U.S. 318, 320, n.3 (1977)), as well as the corollary right of " 'every consumer . . . to look to the free competition from every producing area in the Nation to protect him from exploitation by any." [20] *Hafer v. Melo*, 502 U.S. 21 (1991), itself rejected the notion that § 1983 is unavailable against state officials for claims which arise from actions taken in their official (as distinct from their private) capacity.

The issue is whether a State which already affords jurisdiction to its courts to hear declaratory challenges to a facially invalid tax statute, may nonetheless refuse to hear the federal claims against the tax statute. The trial court below based its rejection on an odd contortion of the Tax Injunction Act of 1937, 28 U.S.C. § 1341, which precludes *federal courts* from exercising jurisdiction over challenges to State tax disputes. (Appendix at 17a). As *Fair Assessment in Real Estate v. McNary*, 454 U.S. 100 (1981) makes clear, the purpose of the provision is to

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[20] *Id.*, quoting *H.P. Hood & Sons, Inc. v. DuMond*, 336 U.S. 525, 539 (1949)); *see also Boston Stock Exch.*, 429 U.S. at 320, n.3 ("The Exchanges' complaint alleged that their members traded on their own accounts in securities subject to the [discriminatory] tax. The members therefore suffer an actual injury within the zone of interests protected by the Commerce Clause."); *Aronson v. Commonwealth*, 401 Mass. 244, 516 N.E.2d 137, 139 (1987) ("[A] plaintiff who alleges that she has been forced to pay an unconstitutional tax alleges an injury personal to her, and she has the right to test in court the questions of constitutionality and of injury").

curtail intrusion by the federal *courts*, leaving these challenges to be decided by the State courts. *Fair Assessment* makes clear that the statute does not license the state courts to decline their obligation to adjudicate federal claims.

The issue is certain to arise repeatedly in the future. As noted by this Court in the incredibly prolonged battle over whether the States must grant relief to federal retirees who were discriminatorily taxed on their pensions, while State retirees were exempt,[21] the State courts seem impossibly divided in their correct role on these matters as an independent judiciary or a rubber-stamp for the Tax Collector. The Tennessee Supreme Court's decision in *Bloomingdale's by Mail Ltd. v. Huddleston*, 848 S.W.2d 52 (Tenn. 1992) *cert. denied*, 113 S.Ct. 3002 (1993), permitting § 1983 jurisdiction is obviously the correct view.[22] That is, where a state tax law *on its face* violates a federal constitutional provision, it will often be actionable under 42 U.S.C. § 1983.[23] That being so, a state may not deny to parties properly before it the use of its courts to a federal claim in the absence of a "valid excuse." *Howlett v. Rose*, 496 U.S. at 359.

And the whole *Davis/Harper/Reich* procession suggests that this Court needs to visit this issue because it is cer-

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[21] *See e.g. Davis v. Michigan Dept. of Treasury*, 489 U.S. 803 (1989), *Harper v. Virginia Dept. of Taxation*, 113 S.Ct. 2510 (1993), and *Reich v. Marcus E. Collins*, 115 S.Ct. 547 (1994).

[22] The contrary view espoused in *State ex rel. Hanson v. Quill Corp.*, 500 N.W.2d 196 (N.D. 1993) and *L.L. Bean, Inc. v. Fred Bracey*, 817 S.W.2d 292 (Tenn. 1991) reflects the desire by two state courts, which already reject declaratory relief by their own taxpayers, to thwart § 1983 relief in order to prevent them from getting any relief at all. In *Quill*, the North Dakota Supreme Court procedurally thwarts a § 1983 state court action whose substance had been vindicated in the United States Supreme Court, displays merely a knee-jerk and unseemly reaction of many states to thwart the restitution which they rightly owe upon a determination that taxes were collected under an unconstitutional statute.

tain to recur in the future even if the petitioners prevail in *National Private Truck Council, Inc. v. Oklahoma Tax Commissioner*, No. 94-688,[24] since the states will then require a showing that the taxpayer has already prevailed on the declaratory or refund proceeding before being permitted to initiate a § 1983 action. History suggests that the states will thereafter assert that the claim is moot, and no longer a justiciable controversy, by the rendering of a favorable decision on the declaratory action. Certiorari is thus necessary to prevent the five year shell game that follows *Davis*.

And while the result of entertaining the federal claim means the state may have to pay fees to the successful challenger,[25] the State's desire to avoid any liability for fees [26] and eliminate their incentive ability to attract at-

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[23] Indeed the issue seems actually driven by either pin money fee avoidance or eliminating the litigation incentive (fees are often the only difference between states declaratory judgment statutes and § 1983). Congress' determination in § 1988, that a person's ability to obtain necessary counsel to assert § 1983 rights may require the incentive of attorney's fees is borne out in the context of this case. The balance is otherwise unfairly shifted to a State (willing to litigate fully against a threat to a revenue source, producing tens of millions of dollars annually) versus a taxpayer having to carry litigation of this sort over that taxpayer's State tax (rarely exceeding 10%) of a taxpayer's interest (itself now far less than 10% in the current economy) of even hundreds of thousands of dollars face value of bonds, would effectively eliminate all challenges in the absence of fees.

[24] Certiorari was granted on whether state courts may refuse to grant federal remedies under 42 U.S.C. §§ 1983 and 1988 to persons who have successfully challenged state taxes as violating their rights under the Commerce Clause of the United States Constitution.

[25] *See e.g. Dept. of Revenue v. Kuhnlein*, 636 So.2d 717 (Fla. 1994); *Rowan Companies, Inc. v. Louisiana State Tax Commission*, 623 So.2d 159 (La. 1993); *Radio Common Carriers of New York, Inc. v. State of New York*, 601 N.Y.S.2d 513 (1993).

[26] Held to an unenhanced lodestar by *City of Burlington v. Dague*, 112 S.Ct. 2638 (1992), the fees are, in fact, but a minor amount contrasted with the results of the decision on the substantive issue.

torneys to file such cases is not a legitimate basis for the States' declining jurisdiction over the federal issue.

Indeed, the Supremacy Clause enforces Congress' view that fees *are* a necessary and desired incentive to induce attorneys to pursue these cases. *Maine v. Thiboutot*, 448 U.S. 1, 11 (1980). The State's primary argument below was that § 1983 claims should not be entertained *precisely* because it is fee-driven—that a State may decline to entertain a federal cause of action due solely to its desire to avoid incurring liability for its fees.

Nonetheless, the argument that there is any legitimate state interest in declining the federal cause of action has no bona fide support in States which, like Ohio, already grant state declaratory jurisdiction in such matters.[27]

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[27] *State ex rel. Tracy v. Franklin County Court of Common Pleas*, 66 Ohio State 3d 644, 614 N.E.2d 1047 (Ohio 1993) explicitly endorse Ohio state court's exercise of state law jurisdiction to adjudicate pre-deprivation challenges to the constitutionality of state tax provisions, and to enjoin the collection of those illegal taxes:

> "R.C.5753.01 grants courts of common pleas authority to enjoin an illegal levy or collection of taxes; . . . .
>
> The court further holds that if the common pleas court first determines that the tax enacted in R.C.5753.02 violates 3(C), Article XII of the Ohio Constitution, then the common pleas court has the authority to enjoin collection of the tax, subject to further review and the due course of law." (*Id.*)

Thus, the law of Ohio quite definitively supports both the plaintiff's standing and the trial court's authority to adjudicate this issue under all available grounds, implicitly including § 1983.

CONCLUSION

This case squarely presents two important issues upon which this Court's determination is needed: (1) the constitutionality of taxing the interest on out-of-state municipal bonds while exempting interest on in-state municipal bonds and (2) whether State courts already exercising jurisdiction over a facial challenge to a tax statute may nonetheless refuse to entertain the portion of the challenge asserting a federal cause of action.

Accordingly, the petition for writ of certiorari to the Ohio Appellate Court should be granted.

Respectfully submitted,

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APPENDIX A

THE SUPREME COURT OF OHIO
1995 TERM

To wit: March 1, 1995

Case No. 94-2439

SERENE G. SHAPER,
Appellant/Cross-Appellee,

v.

ROGER W. TRACY, Tax Commission Director of
Ohio Department of Revenue,
Appellee/Cross-Appellant.

ENTRY

Upon consideration of the jurisdictional memoranda filed in this case, the Court declines jurisdiction to hear the case and dismisses the appeal and the cross-appeal as not involving any substantial constitutional question.

COSTS:

Docket Fee, $40.00, paid by Benesch, Friedlander, Coplan & Aronoff.

COSTS:

Docket Fee, $40.00, paid by James Lawrence.

(Franklin County Court of Appeals; No. 94APE0132)

/s/ Thomas J. Moyer
THOMAS J. MOYER
Chief Justice

APPENDIX B

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

No. 94APE01-32

(Regular Calendar)

SERENE G. SHAPER,
Plaintiff-Appellant,

v.

ROGER W. TRACY, Tax Commission Director of Ohio Department of Revenue,
Defendant-Appellee.

OPINION

Rendered on September 29, 1994

APPEAL from the Franklin County Court of Common Pleas.

YOUNG, J.

This matter is before this court upon the appeal of Serene G. Shaper, appellant, from the December 7, 1993 judgment entry of the Franklin County Court of Common Pleas granting summary judgment in favor of Roger W. Tracy, Tax Commissioner of Ohio and Lee Fisher, Attorney General of Ohio, appellees. The history of this case is as follows: appellant is an Ohio resident who owns municipal bonds issued by non-Ohio entities. Appellant filed this action seeking declaratory and injunctive relief, pursuant to R.C. 2721.02 and Section 1983, Title 42, U.S.Code. Appellant claims that R.C. 5747.01(A)(1)

is discriminatory because it includes in adjusted gross income the "interest or dividends on obligations or securities of any state or of any political subdivision or authority of any state," while exempting interest earned on bonds issued by Ohio and its subdivisions and authorities. Appellant sought to enjoin the appellee from assessing and collecting state income tax on interest earned by Ohio residents who owned bonds issued by governmental entities outside of the state of Ohio, and argued that Ohio's taxation scheme violated the Commerce Clause of the United States Constitution.[1] Appellant also moved for class certification and for summary judgment. Appellees moved for summary judgment, and argued that appellant could not maintain an action for declaratory and injunctive relief under Ohio law, because she was limited to the administrative refund claim procedure and was required to exhaust those remedies first. Appellees also argued that appellant was not entitled to relief pursuant to Section 1983, Title 42, U.S.Code and that R.C. 5747.01(A)(1) did not violate the Commerce Clause.

The trial court found that Ohio law permits a party to challenge the constitutionality of a state tax provision via a declaratory judgment action, and that appellant was not required to first exhaust her administrative remedies. However, the trial court found that appellant was not entitled to maintain an action pursuant to Section 1983, Tile 42, U.S.Code, when she had full and adequate state remedies. In addition, the trial court found that appellant was not entitled to injunctive relief unless and until the court determined that R.C. 5747.01(A)(1) was unconstitutional. The trial court held that R.C. 5747.01(A)(1) was not violative of the Commerce

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[1] The Commerce Clause provides: "[t]he Congress shall have Power * * * [t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes[.]" Article I, Section (8), Clause 3 of the United States Constitution.

Clause for two reasons. Initially, the court noted that if the Commerce Clause were to apply, the market participant doctrine exempted Ohio's activity from Commerce Clause scrutiny. Secondly, the court explained that the Commerce Clause had not been applied to acts of a sovereign on behalf of itself, (as opposed to its citizenry), which provided the sovereign with a competitive advantage over another sovereign. Accordingly, the trial court granted summary judgment in favor of appellees, and denied appellant's motion for summary judgment.

Appellant filed this appeal and asserts the following assignments of error:

> "The trial court erred in granting the state defendants' motions for summary judgment (Assignment of Error No. 1) and in denying plaintiff's motion for summary judgment (Assignment of Error No. 2)."

Appellant also presents the following issues for review:

> "1. Whether, in a declaratory action against state officials challenging a state tax provision asserted to violate the Commerce Clause on its face, the action may be maintained, as one of its counts, under 42 U.S.C. § 1983 (Assignments of Error Nos. 1 and 2).
>
> "2. Whether a state violates the Commerce Clause by its discriminatory income taxation of municipal bond interest on only the interest from bonds issued by non-Ohio issuers, while exempting interest earned on all bonds issued by Ohio entities (Assignments of Error Nos. 1 and 2).
>
> "3. Does the Commerce Clause of the United States Constitution prohibit states from discriminating in their own interests, by an income tax that explicitly taxes only the interest earned from other states' bonds?
>
> "4. Does he Commerce Clause not apply to state actions for their own fiscal benefit, in taxation

schemes which intentionally discriminate against out-of-state bond issues?"

The instant action is before this court on an appeal from summary judgment. Summary judgment is proper when reasonable minds can come to but one conclusion, and that conclusion is adverse to the party against whom the motion for summary judgment is made, such party being entitled to have the evidence or stipulation construed most strongly in its favor. Civ.R. 56(C). The parties agree that this case involves a question of law, rather than issues material fact.

Appellant challenges the constitutionality of R.C. 5747.01(A)(1) which taxes the interest on obligations issued by non-Ohio governmental entities, while exempting any interest earned on obligations issued by Ohio governmental entities. R.C. 5747.01(A) provides in pertinent part:

> "'Adjusted gross income' means adjusted gross income as defined and used in the Internal Revenue Code, adjusted as follows:
>
> "(1) Add interest or dividends on obligations or securities of any state or of any political subdivision or authority of any state, other than this state and its subdivision and authorities[.]"

The trial court found that R.C. 5747.01(A)(1) was constitutional and did not violate the Commerce Clause for two reasons. Initially, the court found that the state of Ohio acts as a market participant when it issues bonds. The market participant doctrine recognizes that when a sovereign acts as a consumer or vendor in commerce, its actions as a market participant are distinct from its actions as a market regulator. The Commerce Clause is directed at the state's actions as a market regulator, therefore, actions as a market participant are exempt from Commerce Clause analysis. Clearly, when a state chooses to sell bonds and enter into the securities market,

it is acting as a market participant. However, when a state chooses to tax its citizens, it is acting as a market regulator. As stated by the United States Supreme Court:

> "The market-participant doctrine has no application here. The Ohio action ultimately at issue is neither its purchase nor its sale of ethanol, but its assessment and computation of taxes—a primeval governmental activity. To be sure, the tax credit scheme has the purpose and effect of subsidizing a particular industry, as do many dispositions of the tax laws. That does not transform it into a form of state participation in the free market. * * *" *New Energy Company of Indiana v. Limbach* (1988), 108 S.Ct. 1803, 1809.

Thus, we find that the market participation doctrine has no application to the instant action, as the state of Ohio is acting as a market regulator in its assessments of taxes.

However, we do agree with the trial court's conclusion that neither the Supreme Court, nor any case law examined, has applied the Commerce Clause to a case such as this, where one governmental entity is taxing its residents for the interest earned on bonds issued by another governmental entity. The trial court found that much of the Commerce Clause case law developed thus far, involved taxation schemes that benefitted a private industry or business in the state, to the detriment of out-of-state businesses. Accordingly, the trial court found that the Commerce Clause was simply never intended to apply to acts of a sovereign on behalf *of itself* where the end result is to provide the taxing state with a competitive advantage over *another* sovereign. Because the court found that the Commerce Clause did not apply to such a scenario, it found that R.C. 5747.01(A)(1) was not unconstitutional.

A review of the case law developed by the United States Supreme Court demonstrates that the Commerce

Clause has been directed at acts of a sovereign on behalf of its citizenry to improperly provide *its citizenry* with a competitive advantage over the *citizenry* of other states. The parties herein, have provided this court with numerous Commerce Clause cases, whereby taxation schemes were challenged when a state's taxation scheme dicriminates against out-of-state businesses or entities. See *Dominion National Bank v. Olsen* (6th Cir. 1985), 771 F.2d 108; *Boston Stock Exchange v. State Tax Commission* (1977), 429 U.S. 318, 97 S.Ct. 599; *Madden v. Commonwealth of Kentucky* (1940), 309 U.S. 83, 60 S.Ct. 406. None of the cases cited are directly on point. The instant action does not involve a taxation scheme whereby the citizenry of Ohio are provided with a competitive advantage over the citizenry of other states. Rather, the taxation scheme in the instant action benefits the state of Ohio itself.

Appellant is challenging Ohio's taxation scheme because Ohio includes, as adjusted gross income, interest income appellant earns from the bonds of other states. This court, after extensive research, has only been able to locate one case that is factually close, although the tax in question was not challenged on Commerce Clause grounds. In *Bonaparte v. Tax Court* (1881), 104 U.S. 592, the Supreme Court stated that "[t]he Constitution does not prohibit a State from including in the taxable property of her citizens so much of the registered public debt of another State as they respectively hold, although the debtor State may exempt it from taxation or actually tax it." *Id.* at syllabus. In *Bonaparte,* the taxpayer argued that, because the debtor state exempted its bonds from taxation, the taxpayer's resident state was required to exempt the bonds pursuant to the full faith and credit clause. The Supreme Court rejected this argument and stated: "[i]t is true, if a State could protect its securities from taxation everywhere, it might succeed in borrowing money * * * but, * * * it cannot secure such exemption outside of its own jurisdiction * * *." *Id.* at 595. In

writing for the majority, Chief Justice Waite stated: "[w]e know of no provision of the Constitution of the United States which prohibits such taxation." *Id.* at 594.

In other cases cited by the parties, the relationship between a state and the federal government was crucial to the court's analysis. *Davis v. Michigan Dept. of Treasury* (1989), 489 U.S. 803, 109 S.Ct. 1500; *Memphis Bank & Trust Co. v. Garner* (1983), 459 U.S. 392, 103 S.Ct. 692. These cases balance a state's interest against the *federal* government's interest. Thus, questions concerning states' rights and the Tenth Amendment are often implicated. As a result, these cases are not directly on point, as the case before us involves the relationship between Ohio and other *states.* However, we find the case of *South Carolina v. Baker* (1988), 45 U.S. 505, somewhat helpful to our analysis. In that case, the Supreme Court held that state bond interest was not immune from nondiscriminatory federal tax. (Overruling *Pollock v. Farmers' Loan & Trust Co.* (1895), 157 U.S. 429, 15 S.Ct. 673.) The court stated as follows:

> "* * * *The owners of state bonds have no constitutional entitlement not to pay taxes on income they earn from the bonds* and States have no constitutional entitlement to issue bonds paying lower interest rates than other issuers. * * *" *Id.* at paragraph two of the syllabus. (Emphasis added.)

It must be noted that the tax on the state bond interest in *South Carolina v. Baker* was not challenged on Commerce Clause grounds.

We agree with the trial court's rationale that "neither the Supreme Court nor any case law examined has applied the Commerce Clause to actions between government entities. Each state has a legitimate interest in tapping a major source of tax revenue while adding an incentive for investors to purchase state bonds. Those purchasers then become the major beneficiaries of the

issuance of the bonds for state issues, capital improvements, and similar benefits." Given the lack of any precedent to apply the Commerce Clause to this type of taxation scheme, we are unable to find R.C. 5747.01 unconstitutional as violative of the Commerce Clause.

The next issue we must address is whether or not the trial court erred in finding that appellant does not have the right to maintain a Section 1983, Title 42, U.S.Code action in Ohio courts to challenge an alleged unconstitutional tax provision. The trial court found that appellant could not maintain a Section 1983, Title 42, U.S. Code challenge to the statute, because state remedies offer her full and adequate relief. On appeal, appellant argues that her state remedies do not provide full and adequate relief.

Initially we note that Commerce Clause violations are cognizable under Section 1983, Title 42, U.S.Code. *Dennis v. Higgins* (1991), 111 S.Ct. 865. The type of relief sought, however, is critical to our analysis. To the extent that appellant seeks monetary damages, her Section 1983, Title 42, U.S.Code claim must fail. When sued for damages, state and state officials acting in their official capicities are not "persons" pursuant to Section 1983, Title 42, U.S.Code. *Will v. Michigan Department of State Police* (1989), 491 U.S. 58, 109 S.Ct. 2304. In a case where a party seeks injunctive, or prospective relief, a state official in his or her official capacity does qualify as a "person" for purposes of Section 1983, Title 42, U.S.Code. *Id.* at 71, 2312.

In a similar case, the Indiana Supreme Court held that the taxpayer had no cognizable claim under Section 1983, Title 42, U.S.Code for damages against the Department of State Revenue. In that case, the taxpayer alleged that an intangibles tax violated the Commerce Clause. The court held that there was no cognizable claim, because the state was acting in its official capacity in enacting and collecting the tax. *Indiana Dept. of State Revenue v.*

Felix (Ind. 1991), 571 N.E.2d 287. The court further held that the taxpayer had no cognizable suit under Section 1983, Title 42, U.S.Code for declaratory or injunctive relief, as the tax did not violate the Commerce Clause. *Id.* at 295. As stated by the Supreme Court of Indiana: "* * * [e]ven if the tax had not been repealed, our determination that the tax is constitutional would have resolved any claim for such relief. Plaintiffs have no cognizable suit for relief under § 1983." *Id.* at 295.

We find the above rationale pertinent to the instant action. Because we have no precedent to apply the Commerce Clause, and hav upheld the taxation statute in question, any claim that appellant may have pursuant to Section 1983, Ttile 42, U.S.Code is moot.

We would also note that appellant has asked for a class action in this case, and that the trial court did not rule upon this request. As stated in *Aronson v. Commonwealth* (Mass. 1987), 516 N.E.2d 137:

> "* * * It is one thing to tolerate, outside normal administrative procedures, an action for declaratory relief * * * [w]here, however, an attempt is made to obtain refunds of substantial amounts of money on behalf of numerous unidentified taxpayers, the procedures of the administrative process should not be bypassed. Tax collectors and other public officials are entitled to know what portion of collected revenues is subject to challenge and are entitled to insist on adherence to fixed schedules for timely applications for abatement and for other steps in the administrative process. We find unacceptable such an open-ended contingent liability based on an action for declaratory relief. A class should not be certified in actions of this character." *Id.* at 144.

We find the reasoning in *Aronson* persuasive. However, we also find that the issue of class certification is moot, because appellant is not entitled to relief. As

stated by the court in *Indiana Department of State Revenue v. Felix, supra*: "[i]nasmuch as the Clerks have lost their case on the merits, their contention of error concerning their role as representatives of class members similarly situated is moot." *Id.* at 296.

Accordingly, appellant's assignment of error, and issues for review, are overruled and the Franklin County Court of Common Pleas entering summary judgment in favor of appellees is hereby arffimed.

Judgment affirmed.

BRYANT and MAHONEY, JJ., concur.

MAHONEY, J., retired, of the Ninth Appellate District, assigned to active duty under the authority of Section 6(C), Article IV, Ohio Constitution.

BRYANT, J., concurring.

Concurring in the majority's analysis of appellant's contentions under the Commerce Clause, and the majority's determination that its conclusion under the Commerce Clause renders her arguments under Section 1983, Title 42, U.S.Code moot, I thus concur in the majority's holding that the judgment of the trial court is affirmed.

APPENDIX C

[Filed Sep. 29, 1994]

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLANT DISTRICT

No. 94APE01-32

(Regular Calendar)

SERENE G. SHAPER,
Plaintiff-Appellant,

v.

ROGER W. TRACY, Tax Commission Director of
Ohio Department of Revenue,
Defendant-Appellee.

JOURNAL ENTRY OF JUDGMENT

For the reasons stated in the opinion of this court rendered herein on September 29, 1994, the assignment of error is overruled, and it is the judgment and order of this court that the judgment of the Franklin County Court of Common Pleas is affirmed.

YOUNG, BRYANT & MAHONEY, JJ.

By /s/ John C. Young
JUDGE JOHN C. YOUNG

MAHONEY, J., retired, of the Ninth Appellate District, asigned to active duty under the authority of Section 6(C), Article IV, Ohio Constitution.

APPENDIX D

[Filed Nov. 12, 1993]

COURT OF COMMON PLEAS
FRANKLIN COUNTY, OHIO

Case No. 93CVH-11-9271

Judge Evelyn J. Stratton

SERENE G. SHAPER,

Plaintiff,

v.

ROGER W. TRACY, TAX COMMISSIONER OF OHIO,

Defendant.

DECISION

Rendered this ——— day of November, 1993.

STRATTON, E.

This matter is before the Court on Cross-Motions for Summary Judgment filed by all parties. All parties agree that there are no issues of fact and that the decision of this Court rests purely on the law. The Court has reviewed all the numerous responses and replies, including Plaintiff's Post-Argument Brief and Defendant's Reply.

The issues are relatively straight-forward:

I. May the Plaintiff maintain an action for declaratory and injunctive relief?

II. Is Plaintiff required to exhaust her administrative remedies first?

III. Does Plaintiff have the right to a 42 U.S.C. § 1983 action?

IV. Does O.R.C. § 5747.01(A)(1) which taxes the interest income on obligations of non-Ohio obligations, while exempting such taxation of Ohio obligations, violative of the Commerce Clause of the United States Constitution?

I. MAY THE PLAINTIFF MAINTAIN AN ACTION FOR DECLARATORY AND INJUNCTIVE RELIEF?

The Court finds that Plaintiff may maintain an action for declaratory relief. This issue has now been clearly resolved by the Ohio Supreme Court in *State ex rel. Tracy F. Franklin County Common Pleas Ct.*, No. 93-459, in which the Supreme Court declared that O.R.C. 2723.01 gives Common Pleas Courts such authority:

> § 2723.01 Jurisdiction of courts of common pleas.
>
> Courts of common pleas may enjoin the illegal levy or collection of taxes and assessments and entertain actions to recover them when collected, without regard to the amount thereof, but no recovery shall be had unless the action is brought within one year after the taxes or assessments are collected.

However, the Supreme Court also found that the Common Pleas Court must first make a determination of illegality before granting any such injunction. Therefore, this Court must first reach the legal issues in the declaratory judgment action before addressing remedies.

II. IS PLAINTIFF REQUIRED TO EXHAUST HER ADMINISTRATIVE REMEDIES FIRST?

The Court finds that Plaintiff is not required to first exhaust her administrative remedies before seeking declaratory relief.

Plaintiff has filed for a refund with the Board of Tax Commissioners which has now reached a Final Determination in the Personal Income Tax Refund Claim No.

IT-6832 for tax years 1988-1991 filed by Serene G. Shaper. That Final Determination correctly states the Commissioner has no authority to deal with class actions. The Final Determination appears to go on to consider some of the constitutional claims, although the Tax Commissioner has no authority to declare such taxes illegal or unconstitutional. The Tax Commissiontr rejected the refund claim and that case may now proceed to the Board of Tax Appeals and from there to the Supreme Court. Therefore, the Plaintiff is clearly pursuing administrative remedies concurrently.

However, the Court does not find such administrative remedies to be exclusive or exhausted and that Plaintiff is not required to conclude her administrative remedies to proceed with this action, particularly in a class action format.

O.R.C. 2723.01 implicitly gives the Common Pleas Court authority to find a taxing scheme illegal and the Supreme Court in *State ex rel. Tracy, supra,* has now so confirmed. The bottling industry in *Tracy* was not required to exhaust administrative remedies or pay the tax and seek refunds before seeking declaratory and injunctive relief.

In *Herrick v. Kosydar,* 44 Ohio St. 2d 128 (1975), the Supreme Court noted that administrative agencies are without jurisdiction to rule on the constitutionality of a statute and that forcing administrative exhaustion first would only result in futile delays. The matter eventually would end up in the Supreme Court either route. Further, the Supreme Court held:

> Whatever may be the rule in other jurisdictions, it is settled in Ohio that an action for a declaratory judgment may be alternative to other remedies in those cases in which the court, in the exercise of sound discretion, finds that the action is within the spirit of the Uniform Declaratory Judgments Act,

> Gen. Code, § 12102-1 *et seq.*, that a real controversy between adverse parties exists which is justiciable in character, and that speedy relief is necessary to the preservation of rights which may be otherwise impaired or lost. [Citations omitted. p. 130.]

As to the inability of administrative remedies to deal with class actions, the Court held (Per Curiam):

> Further, the present action is a class action, brought on behalf of an estimated 40,000 claimants. Administrative remedies would require each of those claimants to file a separate refund application, a requirement which can hardly be considered an equally serviceable alternative to a single declaratory judgment action. A class action provides various other procedural benefits and safeguards, as set out in Civ. R. 23, and offers clear advantages for large groups of litigants with similar interests. None of these advantages would be available in an administrative hearing, or in an appeal therefrom to the courts. [p. 130].

The Supreme Court found that a declaratory judgment action involving a large class seeking refunds of income taxes on state pensions to be "clearly a superior remedy for the Plaintiffs" (p. 130). Therefore, the Court finds that Plaintiff does not need to exhaust her administrative remedies and may proceed forward with this action.

III. DOES THE PLAINTIFF HAVE A RIGHT TO MAINTAIN A 42 U.S.C. § 1983 ACTION IN OHIO STATE COURTS?

The Court finds that Plaintiff does not have the right to maintain a 42 U.S.C. § 1983 action in Ohio State Courts.

Federal case law has clearly prohibited parties from attacking state tax matters in Federal Court under the

Tax Injunction Act of 1937, 28 U.S.C. § 1341, which provides:

> The district courts shall not enjoin suspend or restrain the assessment, levy or colleciton of any tax under state law where a plain, speedy and efficient remedy may be back in the courts of such state.

Fair Assessment in Real Estate v. McNary, (1981), 454 U.S. 100 broadened the application of the Tax Injunction Act finding that the financial stability of the States was best served by allowing state courts to deal with state remedies:

> Taxpayers must seek protection of their federal rights by *state remedies* provided, of course, that thoes remedies are plain, adequate, and complete, and may ultimately seek review of the state decisions in this court. [p. 116]

The *Fair* Decision also expands the prohibition to federal monetary damages as well as injunctive relief.

The majority of state courts have held that § 1983 actions cannot bc maintained in state courts either. This rationale is sound, and is not, as Plaintiff suggests, an attempt to shirk a state's responsibility to carefully examine the constitutionality of its own tax strutcure. But it defies rationale to expand state actions to include those challenges that are prohibited in federal courts, especially when state courts have adequate remedies to deal with the same issue.

One issue looked at by other jurisdictions ruling on § 1984 actions is the adequacy of speedy state remedies. In *Sunderland Properties, Inc. v. County of Berks,* (1990) 750 F. Supp. 704, the Pennsylvania Court noted that:

> A plaintiff's state remedy is plain, speedy and efficient if it provides the taxpayer with a full hearing and judicial determination at which the taxpayer

> may raise federal constitutional objections. *Rosewell v. LaSalle National Bank,* 450 U.S. 503, 514 [101 S. Ct. 1221, 1229, 67 L. Ed. d 464] (1981). . . . The state remedy that will suffice need only be adequate, and need not be coextensive with the remedies in federal court. In other words, the state remedy that will meet the requirement of plain, speedy and efficient need not be the best or most convenient one. [p. 707]

In this case, Plaintiff is pursuing both an administrative appeal and declaratory relief in State. Both remedies, especially the Tax Court, are speedy, efficient and afford full and adequate due process protection to the Plaintiff. The Pennsylvania Court put it well in *Greenwich Township v. Murtagh,* (1992) 144 Pa. Commw. 624, 601 A.2d 1352:

> We join the consensus of other state courts that a Section 1983 challenge to state tax administration is not maintainable if state remedies afford the taxpayer an opportunity for full and adequate relief. Both Congress, by enacting the Anti-Tax Injunction Act, and the Supreme Court, by its holding in *Fair Assessment,* prohibiting or declining to exercise jurisdiction, *have decided that federal interests are not advanced by allowing federal causes of action to intrude upon a carefully formulated state system designed to rectify state tax disputes.* Since federal courts decline to exercise jurisdiction because federal intrustion in state tax schemes is unwarranted, state courts should also not interfere, because its enforcement of Section 1983 is not less intrusive or disruptive than if enforced by a federal court. [Emphasis supplied, p. 1356]

The rationale is also well expressed in *North Dakota v. Quill Corporation,* upon rehearing, (May 11, 1993), Case No. 920283, 1993 N.D. Lexis 90, cert. denied on rehearing. The Court's conclusion summarizes this Court's Opinion succinctly (p. 15):

> A state might be forced to entertain in its own courts, suits from which it was immune in federal court.

Therefore, the Court finds that § 1983 actions for a tax challenge are not permissible in Ohio State Courts and that the Plaintiff possesses its full and fair remedies —a Tax Appeal and a Common Pleas Action—to challenge such tax structures.

IV. DOES O.R.C. § 5747.01(A)(A) WHICH TAXES INTEREST INCOME ON OBLIGATIONS OF NON-OHIO ISSUES WHILE EXEMPTING SUCH TAXATION OF OHIO OBLIGATIONS VIOLATIVE OF THE COMMERCE CLAUSE OF THE UNITED STATES CONSTITUTION?

The fourth issue and the heart of this case is whether the tax exempt status of Ohio issued bonds is illegal and/or unconstitutional, or in particular, violates the Commerce Clause of the United States Constitution.

The Court, having carefully reviewed all of the well-researched arguments of all three counsel, and having heard oral argument on the same, finds it does not.

This issues appears to be one of first impression in Ohio.

On July 13, 1992, Plaintiff Serene G. Shaper, filed the above-captioned action in the Cuyahoga County Court of Common Pleas seeking relief pursuant to R.C. § 2721.03 that R.C. 5747.01(A)(1) be declared unconstitutional as in conflict with Article I, § 8, Cl. 3 of the Constitution of the United States, the Commerce Clause, and that the Defendant, Tax Commissioner, be enjoined from assessing and collecting state income tax, pursuant to said statute, "upon interest earned by Ohio residents upon bonds issued by governmental entities outside the State of Ohio."

Under Ohio Rev. Code Ann. § 5747.01(A)(1) (Baldwin 1991), "adjusted gross income" for purposes of Ohio income taxation includes:

> interest or dividends on obligations or securities of any state or of any political subdivision of any state, other than this state and its subdivisions and authorities.

Plaintiff has purchased numerous out-of-state bonds, according to her tax returns. For example, in 1991, of $115,940.50 of reported Ohio taxable income, 26%, or $30,411.05 of income came from non-Ohio governmental obligations. Plaintiff has filed (and now been denied) a refund on the tax on those non-Ohio government obligation and concurrently filed this class action.

Shaper argues that R.C. § 5747.01(A)(1) discriminates against interstate commerce by making Ohio's governmental obligations more marketable in Ohio, by virtue of their state tax exemption, than the obligations of other states. She argues that the sole purpose behind the provision is to accomplish just this result—economic protectionism. Defendants argue that the Commerce Clause does not apply to interstate commerce between sovereign entities and that nevertheless, this activity is exempt as a market participant rather than a market regulation.

The Court finds that although the "market participant" theory applies, the better rationale is that the Commerce Clause was never intended to govern transactions between government entities.

Plaintiff has been able to cite no case law that is directly on point. All of the cases, in some form or fashion, deal with the state's involvement or protection of private enterprise that in some way favors a private entity within a state over another industry out of state.

Plaintiff repeatedly tries to rely on *Boston Stock Exchange v. State Tax Commission,* (1977), 429 U.S. 318,

50 L. Ed 2d 514. However, *Boston* fits into the same pattern of state protection of private enterprise. *Boston* involved an attempt by the State of New York, through its taxing powers, to provide a competitive edge to private business of the New York Stock Exchange, by imposing a higher tax on in-state transfers of securities resulting from out-of-state sales than those resulting from in-state sales, thus giving the New York Stock Exchange a competitive edge.

Noting that "The obvious effect of the tax is to extend a financial advantage to sales on the New York exchanges at the expense of the regional exchanges," 50 L. Ed. 2d 525, the Supreme Court found the statute to violate the Commerce Clause. The Court's key finding, which distinguishes *Boston* from government entities, is:

> Among these is the fundamental principle that we find dispositive of the case now before us. No State may, consitsent with the Commerce Clause, "impose a tax which discriminates against interstate commerce—*by providing a direct commercial advance to local business.*"
>
> The prohibition against discriminatory treatment of interstate commerce follows inexorably from the basic purpose of the Clause. Permitting the individual States to enact laws that *favor local enterprises* at the *expense of out-of-state businesses* "would invite a multiplication of preferential trade areas destructive" of the free trade which the Clause protects. [Emphasis supplied, citations omitted.] 50 L. Ed. 2d 525.

The key difference is the protection of *local enterprise.* In *New Energy Co. of Indiana v. Limbach,* (1988) 486 U.S. 269, dealing with Ohio's tax credit for ethanol produced in Ohio or for states granting reciprocal credits, again protection of private enterprise was involved and the Court invalidated the scheme. The Court found at p. 277 that:

> "the tax credit scheme has the purpose and effect of subsidizing a particular industry."

The Court went further in *New Energy Co.* in discussing the "market participant" theory which has evolved from several previous Supreme Court Decisions. Under the doctrine developed from these decisions, known as the "market participation doctrine," the Court has recognized that when the sovereign acts as a consumer or vendor in commerce, its actions as a market participant are distinct from its actions as market regulator (to which the Commerce Clause is directed), and are therefore exempt from Commerce Clause analysis, even though the actions provide discriminatory economic advantages to the state's private businesses. See *Hughes v. Alexandria Scrap Corp.* (1976), 425 U.S. 794, 49 L. Ed. 2d 200; *Reeves, Inc. v. Stake* (1980), 447 U.S. 429, 65 L. Ed. 2d 244; *White v. Massachusetts Counsel of Construction Employers, Inc.* (1983), 460 U.S. 204, 75 L. Ed. 2d 1; *South Central Timber Development, Inc. v. V. Wunnickl* (1984), 467 U.S. 82, 81 L. Ed. 2d 71.

These four cases developed the market participant theory, but *New Energy Co.* summed it up well (p. 277):

> That doctrine differentiates between a State's acting in its distinctive governmental capacity, and a State's acting in the more general capacity of a market participant; only the former is subject to the limitations of the negative Commerce Clause. *See Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794, 806-810, 96 S.Ct. 2488, 2496-2498, 49 L.Ed.2d 220 (1976). *Thus, for example, when a State chooses to manufacture and sell cement, its business methods, including those that favor its residents, are of no greater constitutional concern than those of a private business. See Reeves, Inc. v. Stake,* 447 U.S. 429, 428-439, 100 S.Ct. 2271, 2278, 65 L.Ed. 2d 244 (1980). [Emphasis supplied.]

Or as *Carll v. S.C. Jobs-Economic Devel. Authority* (1985), 372 S.E. 2d 331 (Supr. Ct., S.C.) states (p. 338):

> As a market participant, the State has the same rights as all other market participants. A trader may buy from whom he please, sell to whom he pleases and conversely, refuse to do so for reasons sufficient to himself.

In *New Energy Co.*, the state tried to justify the granting of tax credits to Ohio ethanol producers as a "market participant." But the Court found that not to be so; Ohio did not act as a seller or supplier or business itself in the ethanol process; Ohio merely provided tax control, which because it was *not* a state business activity (market participant) and because it *did* favor private business over out-of-state business, the tax credit was found to violate the Commerce Clause.

But again, *New Energy Co.* is distinguishable because it did *not* deal with commerce between state sovereigns, but rather protection of private enterprise.

An analogy can be drawn that in exempting its own governmental obligations from state income tax, that Ohio is acting as a market participant, as a business, and therefore free to seek a competitive edge. This Court can find no case that prohibits such action.

The better rationale is that neither the Supreme Court nor any case law examined has applied the Commerce Clause to actions between government entities. Each state has a legitimate interest in tapping a major source of tax revenue while adding an incentive for investors to purchase state bonds. Those purchasers then become the major beneficiaries of the issuance of the bonds for state issues, capital improvements, and similar benefits. To remove such an inducement would reduce a state's ability to fund its own debts, obligations, and capital improvements.

Carried to its extreme, Plaintiff's position would decry the federal government's ability to issue tax-exempt securities. Why should the federal government enjoy any greater protection from income tax in funding its obligations than state governmental obligations? Would not its own exemptions violate the Commerce Clause as much as the State's?

In conclusion, whether one treats a state in issuing its own tax-exempt securities and taxing those of other state entities as a market participant issue, or whether the Commerce Clause was simply never intended to apply to such state actions for its *own* protection, not that of private businesses, the Court finds that the Commerce Clause does not apply, and O.R.C. 5747.091(A)(1) is not unconstitutional.

Because of the holding reached by this Court, there is no need to address the issues of class certification.

Therefore, Plaintiff's Motion For Summary Judgment is DENIED and Defendants Roger Tracy, Tax Commissioner and Lee Fisher, Ohio Attorney General's Motion for Summary Judgment are GRANTED. Counsel for Defendants shall prepare a Judgment Entry within 10 days. Costs to Plaintiff.

/s/ E. Stratton
JUDGE EVELYN J. STRATTON

APPENDIX E

[Filed Dec. 7, 1993]

IN THE COURT OF COMMON PLEAS
FRANKLIN COUNTY, OHIO

Case No. 92CVH-11-9271

JUDGE EVELYN J. STRATTON

SERENE G. SHAPER,
Plaintiff,

v.

ROGER W. TRACY, TAX COMMISSIONER OF OHIO,
Defendant.

JUDGMENT ENTRY

This matter is before the Court on Cross-Motions for Summary Judgment filed by all parties. The Court, having reviewed the motions, briefs and oral arguments of the parties, agrees with the parties that there are no genuine issues of fact material to the case and that the case rests purely on issues of law. The Court, having carefully considered these issues, holds, for the reasons more fully set forth in its Decision of November 12, 1993, incorporated herein by reference, as follows:

1. The Plaintiff, pursuant to R.C. § 2723.01, has the right to maintain an action for declaratory relief to contest the constitutionality of R.C. § 5747.01(A)(1).

2. The Plaintiff has no obligation to first exhaust her administrative remedies pursuant to Personal Income Tax Refund Claim No. IT-6832 for tax years 1988-1991, currently pending before the Board of Tax Appeals, in which she has raised the same constitutional claim.

3. The Plaintiff has no right to an injunction under R.C. § 2723.01 unless, and not until, this Court would make a determination of illegality.

4. The Plaintiff has no right to maintain a 42 U.S.C. § 1983 action to contest the constitutionality of R.C. § 5747.01(A)(1) when she has full and adequate state remedies to deal with the same issue.

5. R.C. § 5747.01(A)(1), which taxes interest and dividend income on non-Ohio governmental obligations held by Ohio taxpayers while exempting the interest and dividend income of Ohio governmental obligations held by Ohio taxpayers, is not violative of the Commerce Clause, Article I, § 8, Cl. 3, of the United States Constitution.

WHEREFORE, Plaintiff's Motion for Summary Judgment is hereby DENIED;

The Cross-Motions for Summary Judgment of Defendants Roger W. Tracy, Tax Commissioner of Ohio, and Lee Fisher, Ohio Attorney General, are hereby GRANTED;

Costs are assessed to the Plaintiff.

JUDGE EVELYN J. STRATTON

APPROVED:

CLINTON A. KRISLOV
Attorney for Plaintiff

/s/ Andrew Bergman
ANDREW BERGMAN
Attorney for Defendant Lee Fisher

/s/ Lawrence D. Pratt
LAWRENCE D. PRATT
Attorney for Defendant Roger W. Tracy

APPENDIX F

Excerpt from Transcript of Proceedings

IN THE COURT OF COMMON PLEAS
OF FRANKLIN COUNTY, OHIO
CIVIL DIVISION

Case No. 92CVH11-9271

SERENE G. SHAPER,

Plaintiff,

vs.

ROGER W. TRACY, *ex rel.* Tax Commissioner of Ohio, and LEE FISHER, Attorney General of the State of Ohio,

Defendants.

TRANSCRIPT OF PROCEEDINGS

Before Judge, Evelyn Stratton, on Monday afternoon, September 13, 1993.

* * * *

[55] THE COURT: You are saying here because actually selling something, selling bonds and stocks and whatever else, bonds and securities that is the private industry they're engaging in?

MR. PRATT: Absolutely, just like they were selling cement in one of the other market participant cases that the Supreme Court addressed.

The doctrine applies both to the sale and purchase of goods. And as long as the state is on one side and acting

more like a private participant than as a state. They cite doctrine of loss. Once again, if the state is merely marketing its bonds more successfully by creating certain advantages to consumers of this to bonds, it's acting as a market participant.

That's what we would suggest the court find. If the court does not initially find—again, this is our first premise, that the clause doesn't apply to all. To this situation both on its case by its interpretation. If we get past those two stages. then we need to address the next issue, which is whether or not it's economic protectionism.

And the case law on that issue is specifically—and states that the whether a statute is a protection activity [56] measure, whether it is can be fairly viewed as a law treated to a legitimate local concerns is the test that the court must look at.

The case law also suggested that the burden is on the plaintiff to establish that there is protectionism involved. We don't think the plaintiff has met that burden in the instant case.

There hasn't been any facts presented to court on behalf of the plaintiff that would even remotely address themselves to that particular concern. All we have is a very generic, unconfirmed opinion of the plaintiff that it might be the case, no facts to establish it whatsoever.

THE COURT: But it seems pretty obvious somebody has to pay for tax, then we buy out of state.

MR. PRATT: But the intent must be to create that result. And that hasn't been proven.

THE COURT: What other intent could be intended?

MR. PRATT: We have attached to our memorandum in opposition and in support of our own motion for summary judgment an affidavit. That affidavit contains factual information from one of the individuals who was responsible in drafting and creation of the particular statute at issue, an individual testified extensively before the general assembly as to the pros and cons of the [59] Boston Stock Exchange case look at a couple of key factors of factual nature in each of those two decisions

in reaching their ultimate conclusion that a violation in both cases. It was virtually stipulated on the record by both parties that the only purpose behind the measure was to—for economic protectionism.

It was expressly found to be a factual determination by the court in each of those two decisions. And there was also another circumstance that was looked at as an implied proof that there wasn't any other purpose behind the measure.

In each case it was noted by the court that there wasn't any significant revenue derived from the state as a result of the measure in issue.

As the court has already indicated, that's not the case here. We're talking about $20 million a year in annual revenue to the state of Ohio. Although Mr. Krislov may not know—the court is well aware, we're going through very tough economic times in Ohio.

And I would submit to the court that the State of Ohio would not likely throw away $20 million when it's trying to balance its budget.

There is a significant purpose behind this measure. It would create substantial financial harm to the State of Ohio if it was struck down. That, to me, goes straight [60] towards the argument that there was no other reason behind this measure than to somehow create an economic protectionism facet for the state's bonds.

I would submit to the court further that to the extent that if there is a disparity involved here, it's a disparity that's entirely consistent with the sound policy of this state. If, in fact, it stirs the market behind Ohio bonds in the State of Ohio, where better should that market be? It is the citizens of Ohio that are being benefitted by those Ohio bonds. Why shouldn't they be encouraged to purchase the bonds in their own state?

That is economic protectionism. That is the life blood of the sovereign itself. That is a government function. And I think that function falls well within the policy behind the measure. And I do not think that policy is inconsistent with the United States Commerce Clause.

I don't think in any way it favors the private business over other private business. I think it goes to the sound and fundamental operation of the sovereigns themselves. I think that would be construed to be entirely consistent with the United States Constitution.

Based upon all of those factors, we don't think that the plaintiff has met its burden of establishing commerce clause violations.

* * * *

APPENDIX G

The Wall Street Journal
December 14, 1993 at C19

OHIO SUIT THREATENS TAX ADVANTAGES OF BUYING SINGLE-STATE MUNI FUNDS AND IN-STATE BONDS

By THOMAS T. VOGEL JR.
Staff Reporter of The Wall Street Journal

NEW YORK—Investors scrambling to buy municipal bonds or to invest in municipal-bond funds ahead of next year's big tax increase should take notice of a class-action lawsuit filed by a bondholder against the state of Ohio.

With the benchmark 30-year Treasury bond yielding 6.23% yesterday, up from 6.20% on Friday, many investors are looking to muni bonds for a boost. That's because they expect muni-bond yields, relative to Treasurys, to drop even further as the tax increase and a wave of bond calls in January spur demand.

But for investors in certain types of bonds and bond funds, the Ohio lawsuit may become a bitter pill. The suit, filed by Serene G. Shaper of University Heights, charges that the state is violating the U.S. Constitution by imposing its income tax on income from out-of-state municipal bonds. Most states tax the income of the tax-exempt bonds of other states.

Municipal-bond market experts are worried about the case even though a judge in the Franklin County Court of Common Pleas has already ruled against Ms. Shaper. Her attorney, Clint Krislov, says he plans to appeal the case and try to take it to the U.S. Supreme Court.

If he's successful, it would be bad news for the thriving $132 billion market for single-state municipal-bond funds.

These funds, which specialize in buying the bonds of a single state, are designed to take advantage of the extra tax advantages for residents of those states if they buy in-state bonds. According to Lipper Analytical Services, there are 778 of these funds nationwide.

Oftentimes a bond from your own state will be exempt from federal, state and local taxes. But if Ms. Shaper prevails in her lawsuit in higher courts, such bond funds could lose this advantage. That's because a precedent would be set that could possibly force other states to lift taxes on out-of-state municipal bonds.

"This is something that will never be favorably ruled on at the state level," said Richard Lehmann, president of the Bond Investors Association. "It does have to go to the Supreme Court . . . and there are many reasons to think that the Supreme Court looks unfavorably on these situations." If the lawsuit were finally successful, said Mr. Lehmann, "there would be no point to single-state bond funds."

A ruling in favor of the suit could have a devastating effect on the value of single-state bond funds, said Mr. Lehmann. But appealing the ruling in Franklin County and taking the case to the U.S. Supreme Court "could take a while," Mr. Krislov said.

Such taxing practices, argued Mr. Lehmann, "give some states a certain advantage in the municipal-bond market at the expense of other states." States with low taxes and a small population, for example, see the demand for their bonds weakened when larger states with higher taxes levy taxes on the income from the smaller states' bond issues. A legal precedent that prevented states from taxing the income from municipal bonds of other states could help boost demand for such low tax states, said Mr. Lehmann. "It may be good for the municipal market," he added, "because it could improve the market's liquidity."

The suit, which was filed last year in the Cuyahoga County Court of Common Pleas, argues that Ohio's practice of taxing out-of-state municipal bonds is an "unambiguous discrimination against interstate commerce, solely a protectionist measure that cannot withstand scrutiny under the Commerce Clause" of the U.S. Constitution. The suit names Roger W. Tracy, director of the Ohio Department of Revenue, as the defendant.

In her decision last month, Judge Evelyn J. Stratton of the Court of Common Pleas in Franklin County ruled that "the Commerce Clause does not apply" to this particular case. Her decision said that "neither the Supreme Court nor any case law examined has applied the Commerce Clause to actions between government entities."

Mr. Krislov said he expected such a decision. "We always knew from the beginning that this case would have to get to the Supreme Court," he said, "because no state is going to voluntarily surrender its ability to tax out-of-state bonds."

Meanwhile yesterday, Treasury securities posted moderate losses during light trading in response to a jump in precious-metals prices. For much of the session, the February gold futures contract was up more than $4 an ounce, flirting with $390. A rise in gold prices is often taken as a sign of growing inflation, which reduces the value of investments with a fixed rate of return. But a drop in the prices of other commodities, such as oil, helped ease inflation concerns.

Meanwhile, yesterday the U.S. Treasury also sold $26.15 billion of three-month and six-month bills at its regular weekly auction. The three-month bill was sold at an average discount rate of 3.06% for a coupon-equivalent yield of 3.12%. The six-month bill was sold at an average discount rate of 3.26% for a coupon-equivalent yield of 3.36%

* * * *

APPENDIX H

The Bond Buyer
September 9, 1993 at page 1, column 3

OHIO'S TAX ON OUT-OF-STATE BONDS SPURS SUIT THAT WORRIES INDUSTRY

By Karen Pierog

CHICAGO—A lawsuit charging that Ohio is violating the U.S. Constitution by taxing income on out-of-state municipal bonds could seriously affect the municipal market, industry observers said yesterday.

The class action suit, which was filed last year by a bondholder in a Cleveland suburb, claims that Ohio, which exempts its own bonds from its income tax, is violating the commerce clause of the Constitution with its tax.

Specifically, the suit charges that "the imposition of state income tax upon interest paid by non-Ohio governmental entities is an unreasonable burden on interstate commerce and is nothing more than a protectionist measure that cannot withstand scrutiny under the commerce clause of the United States Constitution."

Last month Franklin County Common Pleas Court Judge Evelyn J. Stratton ruled in Ohio's favor, saying the commerce clause "was never intended to govern transactions between government entities."

However, Clint Krislov, a Chicago attorney representing Serene G. Shaper, the bondholder, said the decision will be appealed to the Ohio Court of Appeals and that he expects to take the case all the way to the U.S. Supreme Court.

"There is no question in my mind that the court will hold that state bonds are instruments of commerce," Krislov said.

He contended that states are participating in a market when they issue bonds and that states that tax income on other states' bonds are using their taxing power to "discriminate in interstate commerce."

Currently, 42 states collect income taxes on out-of-state bonds, while exempting all or some of their own bonds from taxation.

Municipal industry observers said the success of such a lawsuit in the U.S. Supreme Court would have implications for mutual funds that offer single-state funds and for the market as a whole, which would both lose the advantages of double tax-exemption on bonds. In addition, states that levy an income tax on out-of-state bonds could lose millions of dollars of annual revenues.

Richard Lehmann, president of the Bond Investors Association, said that if the suit prevails, "there would be a major, major change in the municipal market."

"All the state funds that were created as tax shelters would all be pointless." Lehmann said, "It would also mean that every municipal bond would be marketable in every state because of equal tax treatment, and that would tremendously liquefy the municipal market because everyone would be in the market for every bond."

On the other hand, Lehmann said some issuers, such as New York City, would see their cost of issuance "skyrocket" because the benefit of double tax exemption would be gone for buyers in the city, and those buyers could put their money in "safer paper."

Richard Ciccarone, a senior vice president and director of tax-exempt fixed-income research at Kemper Securities Inc., agreed that a favorable decision in the case "would throw the specialty state market in disarray."

"The disruption in the market would be substantial, victimizing buyers of in-state paper who were willing to accept lower interest rates because of the double tax ex-

emption and now have concentrated risk," Ciccarone said.

Andrew Jennings, manager of the municipal trading desk at Franklin Advisors Inc., said the impact on single-state funds would depend on whether the high court would rule retroactively or prospectively.

Heather Ruth, president of the Public Securities Association, said while the group has no position on the matter, its policy has been to let states decide how to tax interest on their bonds or the bonds of other states.

"If for any reason the tax liability would be removed on outstanding bonds, it would raise the value of the bonds commensurately," Ruth said.

Krislov said the Ohio case is supported by recent Supreme Court decisions that struck down the higher taxes states were charging on materials such as toxic waste from other states.

"You can't tax incoming toxic waste more heavily than in-state toxic waste," Krislov said. "And you can't treat the bonds of a sister state as if they were an incoming Scud [missile] either."

Krislov said he might file similar cases in other states, but declined to name the states.

The momentum in the Supreme Court "seems to be in the direction of a kind of seamless economy," Lehmann said, which could help the Ohio case.

The case also has a supporter in James F. Blumstein, a law professor at the Vanderbilt Law School, who addresed the matter of state taxation of municipal bonds in an article written in 1978.

"The argument that this is purely a government thing is ridiculous," Blumstein said. "This is an industry—not just a government—issuing bonds."

Moreover, the system of double tax exemption in some states actually leads to higher bond yields for some issuers whose bonds are marketed out of state and must have yields that will attract investors who will have to pay their states' income tax on the bonds, Blumstein said.

Lawrence Pratt, Ohio's assistant attorney general who represented the state, said he feels confident that the state will prevail. Judge Stratton "completely" accepted the state's argument that the commerce clause cannot be applied to a state marketing its own products, Pratt said.

Pratt said Ohio began taxing the income on out-of-state bonds in the 1970s and that the state collects about $20 million annually from taxing those bonds.

APPENDIX I

The Bond Buyer
March 22, 1995 at Page 1, Column 2

PROPOSED MINNESOTA BILL WOULD TAX INTEREST FROM STATE, LOCAL BONDS

By Cris Carmody

A Minnesota lawmaker has sparked jitters in the municipal market by introducing a bill to eliminate the tax exemption now extended to its state and local bonds.

The bill, introduced last week by Rep. Ann Rest, D-New Hope, would impose the state's income tax on the interest earned from all state and local bonds sold after July 1, 1995. Minnesota's income tax, which has a maximum rate of 8.5% would also apply to bonds sold in the secondary market after July 1, regardless of when the debt was initially issued.

If the bill were enacted, Minnesota would join five other states that tax interest income on most of their own bonds—Illinois, Iowa, Kansas, Oklahoma, and Wisconsin.

Some observers estimate that Minnesota could raise $3 million to $4 million annually if the measure becomes law.

Executives in the municipal bond industry were not plead by the proposal.

"I don't think there's much to say other than I'm not happy about it," said Michael Brilley, senior vice president of Sit Investment Associates', which manages the Sit Minnesota Tax-Free Income Fund consisting solely of Minnesota state and local bonds. "It seems dumb to me," he said.

But a House legislative analyst defended the bill. Joel Michael said Rest and her co-sponsors proposed the tax change to head off liability now in the Ohio courts.

The plaintiff in that suit, Serene Shaper, alleges that Ohio violates the commerce clause of the U.S. Constitution when the state taxes income only on out-of-state bonds.

Shaper, however, lost at the trial court level and the Ohio Appeals Court ruled against her last September. The Ohio Supreme Court has declined to hear the case, and Shaper's lawyer, Clint Krislov, said he will ask the U.S. Supreme Court this spring to hear the case.

Minnesota lawmakers have grown cautious about the impact of litigation since January, when the U.S. Supreme Court ruled against the state in a case brought by bankers challenging a law that taxed some federal transactions but not state transactions. As a result, the state must pay $327 million to Cambridge State Bank and other plaintiff banks. "The way the Supreme Court has imposed remedies on the states, we envision two unpalatable alternatives [if Shaper succeeds]. We would either have to exempt the bond interest on out-of-state issues for all open tax years for everyone who files for an income tax refund, or we'd have to retroactively tax Minnesotans on existing bonds," said Michael.

He added lawmakers had two other concerns. Because most bondholders are higher-income citizens, lawmakers find the tax exemptions inequitable. And he said the sponsors worry that because the bonds carry an attractive interest rate to lure out-of-state buyers, Minnesotans who buy un-taxed in-state bonds have an unfair advantage. And the higher interest rate, Michael said is detrimental to issuers.

Municipal officials disagree. "We're opposed to the bill because we're concerned about the impact on borrowing costs for cities," said Gary Carlson, director of intergovernmental affairs for the Minnesota League of Cities. "It certainly would probably hurt smaller cities."

He noted that some bond lawyers told him they rewrote offering documents for pending issues over the weekend to make sure disclosure on the proposal was included.

Ironically, one of the first issues to be priced since the bill's introduction was a $115 million competitive offering from the state of Minnesota. The specter of taxability concerned some market observers, said the state's assistant commissioner of finance Peter Sansen.

Bear, Stearns & Co. won the issue yesterday and an official said the bill had no effect on the pricing. However, Sansen said some investors were worried because if the bill passed, the bonds would become taxable on the secondary market.

"I talked to some buyers of the bonds who were concerned about it. One major investor said he was not going to buy the bonds because of it," Sansen said.

Minnesota House officials said they're aware the measure is not popular among public financiers. "The local investment banking community is strongly opposed to it, because the existing double tax exemption makes it easy for them to sell municipal bonds locally," said Michael.

The Minnesota House Committee on Governmental Operations will hold a hearing on the bill tomorrow.

Prospects for enactment are unclear; the Democratic Farm Labor Party controls both the Minnesota House and Senate, but Gov. Anne Carlson is an Independent-Republican. Carlson's administration has not taken a position on the bill.

(2)

Supreme Court, U.S.
FILED
JUN 29 1995
CLERK

No. 94-1950

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1994

SERENE G. SHAPER,
Petitioner,

v.

ROGER W. TRACY,
Tax Commissioner of Ohio,
and
BETTY D. MONTGOMERY,
Attorney General of Ohio,
Respondents.

On Petition for a Writ of Certiorari to the Ohio
Tenth Appellate District Court of Appeals

RESPONDENTS' BRIEF IN OPPOSITION

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

STATEMENT OF THE CASE 1

REASONS WHY THE PETITION SHOULD BE DENIED 3

I. The Decision Below Does Not Conflict With Any Lower-Court Decisions Or Any Decisions Of This Court. 3

II. The Commerce Clause Does Not Prohibit The State From Taxing Interest On Out-of-State Government Securities Differently From Interest On In-State Government Securities 6

CONCLUSION 12

TABLE OF AUTHORITIES

CASES — Page(s)

Bonaparte v. Tax Court, 104 U.S. 592 (1881) 3

Boston Stock Exchange v. State Tax Commission, 429 U.S. 318 (1977) 7

C & A Carbone, Inc. v. Clarkstown, ___ U.S. ___, 114 S. Ct. 1677 (1994) 8, 11

Carll v. S.C. Jobs-Economic Devel.Authority, 327 S.E. 2d 331 (S.C. 1985) 9

Dean Milk Co. v. Madison, 340 U.S. 349 (1951) 7

Dominion National Bank v. Olsen, 771 F.2d 108 (6th Cir. 1985) 7, 8

Fidelity Guarantee Mortgage Corp. v. Conn. Hous. Finance Auth., 532 F. Supp. 81 (D.C. Conn. 1982) 9

Hughes v. Alexandria Scrap Corp, 426 U.S. 794 (1976) 9

National Private Truck Council, Inc. v. Oklahoma Tax Commission, No. 94-688, ___ U.S. ___, 1995 Lexis 4049 (June 19, 1995) 11

New Energy Company of Indiana v. Limbach, 486 U.S. 269 (1988) 10

Reeves, Inc. v. Stake, 447 U.S. 429 (1980) . . . 7, 9, 10

Shaper v. Tracy, No. 92 CVH-11-9271, (Franklin Cty. C.P. November 12, 1993), *aff'd.*, 97 Ohio App. 3d 760 (1994), *app. den.* 71 Ohio St.3d 1477 (1995) 3, 7, 10

Shaper v. Tracy, No. 95-389 (Ohio Sup. Ct. filed February 17, 1995) 2

Shaper v, Tracy, No. 93-X-1032 (Ohio Bd. of Tax App., January 20, 1995), *appeal docketed*, No. 95-389 (Ohio Sup. Ct. Feb. 17, 1995) 1, 2

Shayne Bros. Inc. v. District of Columbia, 592 F. Supp. 1128 (D.C. D.C. 1984) 10

White v. Massachusetts Council of Construction Employers, Inc., 460 U.S. 204 (1983) 9, 10

CONSTITUTIONAL PROVISIONS AND STATUTES

U.S. Const., art. I, §8, cl. 3 . . . . . *passim*

U.S. Const., art. IV, §1 3

Ohio Const., art. XII, §2 2

Ohio Const., art. VIII, §2b 2

Ohio Const., art. VIII, §2c 2

Ohio Const., art. VIII, §2f 2

Ohio Const., art. VIII, §2g 2

Ohio Const., art. VIII, §2i 2

Ohio Const., art. VIII, §2k 2

Ohio Const., art. VIII, §16 2

OTHER AUTHORITIES

Karen Pierog, *Ohio's Tax On Out-of-State Bond Spurs Suit That Worries Industry*, The Bond Buyer, Sept. 9, 1993 4

Thomas T. Vogel, Jr., *Ohio Suit Threatens Tax Advantages of Buying Single-State Muni Funds and In-State Bonds*, Wall St. J., Dec. 14, 1993 1

STATEMENT OF THE CASE

Petitioner asks the Court to review a state court of appeals decision upholding the constitutionality of a subsidy provided by the State of Ohio for bonds issued by the state or its political subdivisions. The practice of subsidizing local public-works bonds, through a tax exemption for interest earned on those bonds, may well be as old as the history of issuing state and municipal bonds itself. All told, thirty-seven states have such subsidies, the oldest among them dating from the nineteenth century. Prior to this case, not one of these provisions had ever been challenged on Commerce Clause grounds -- much less challenged successfully. Both the trial court and the state court of appeals refused to invalidate this time-honored tradition, correctly concluding that the dormant Commerce Clause does not compel states to treat bonds that are issued to raise money within their state precisely the same as bonds that are issued to raise money outside of their state. Apparently agreeing with the courts below, the Ohio Supreme Court declined to review the case. This Court should do likewise.

For the most part, Respondents agree with Petitioner's Statement of the Case. A few particulars, however, merit elaboration. One, Petitioner neglects to mention, let alone discuss, a parallel state-court action still pending in the Ohio courts. Contemporaneous with this action, Petitioner filed an administrative refund request with the Ohio Department of Taxation for the years 1988 through 1991. That action, like this one, was premised on the alleged unconstitutionality of Ohio's subsidy for local bonds. The Ohio Tax Commissioner denied the claim on August 6, 1993 (Appendix B at 12a), after which the action was appealed to the Ohio Board of Tax Appeals. There, too, relief was denied, as the Board of Tax Appeals affirmed the administrative decision on January 20, 1995. *Shaper v.*

Tracy, No. 93-X-1032 (Ohio Bd. Tax App., January 20, 1995) (Appendix C at 6a). Petitioner then sought mandatory review of the Board's decision in the Ohio Supreme Court. The case is currently pending. *Shaper v. Tracy*, No. 95-389 (Ohio Sup. Ct. filed February 17, 1995) (Appendix A at 1a).[1]

Two, the alleged source of discrimination against interstate commerce is not solely a function of statute. The Ohio General Assembly is not entitled to tax interest earned on Ohio bonds under a provision of the state Constitution that was first adopted in 1905 and that has been readopted in various forms since then. *See* Ohio Const. art. XII, § 2, art. VIII, §§2b, 2c, 2f, 2g, 2i, 2k, 16. Three, the factual record is not entirely complete. Despite repeated attempts by the State, Petitioner has refused to disclose the nature of her out-of-state bond holdings. The record merely contains copies of Petitioner's Ohio income tax returns, which themselves disclose nothing more than the total amount of Petitioner's out-of-state bond income. The nature of the bonds, the state(s) from which they were issued, the precise manner in which the bonds are owned, even the bonds themselves, are not in the record. Notwithstanding repeated requests by the Ohio Tax Commissioner for this and other information, none has been forthcoming in this action or in the parallel administrative proceeding.

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[1] Respondent Tax Commissioner has moved the state supreme court for an order either dismissing the second appeal or summarily affirming the decision of the Board of Tax Appeals under principles of *res judicata* and/or collateral estoppel. Petitioner has opposed the motion, and the court has yet to rule on it.

REASONS WHY THE PETITION SHOULD BE DENIED

I. The Decision Below Does Not Conflict With Any Lower-Court Decisions Or Any Decisions Of This Court.

As an initial matter, no lower-court conflict exists on this issue that would justify further review by the Court. Petitioner does not even suggest that such a conflict exists among the state courts. Indeed none does. In the more than one hundred years in which such legislation has existed, not one state court has found the scheme unconstitutional on Commerce Clause grounds or on any other ground.

Nor, for that matter, has this Court ever indicated that the widely-accepted practice is unconstitutional. On the contrary, the Court in reviewing a similar legislative scheme adopted by the state of Maryland noted that "[w]e know of no provision of the Constitution of the United States which prohibits such taxation." *Bonaparte v. Tax Court*, 104 U.S. 592, 594 (1881).[2] Since then the Court has not altered this view by indicating that the Commerce Clause somehow limits a sovereign's authority to subsidize the raising of local capital in competition with its sister sovereigns. *See Shaper v. Tracy*, 97 Ohio App. 3d 760, 764-766 (1994), *app. den.*, 71 Ohio St. 3d 1477 (1995) (Petition, Appendix B at 6a-9a).

In the absence of any conflict concerning the validity of a statutory scheme in existence for more than a century, it is difficult to understand why the issue needs to be addressed now. Time will test the alleged merits of

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[2] The precise challenge in the case arose under the "full faith and credit" clause of Article IV, Section 1 of the United States Constitution.

Petitioner's claim. After percolating among the lower courts, the issue either will ripen into a certworthy question or "die on the vine." In either event, sudden review of this latent question is not likely to help the Court.

Sudden review of the issue certainly would not help the states. At least 37 states have legitimately relied on their previously unchallenged authority to tax out-of-state government obligations differently from in-state government obligations. (Petition at 8-9 n.3). The significance of that reliance is difficult to overstate. Ohio's taxation of out-of-state bonds, for example, accounts for at least twenty million dollars ($20 million) in annual revenue. Affidavit of Michael P. Sobul, Assistant Administrator of the Tax Analysis and Local Government Distributions Division, Ohio Department of Taxation (Appendix D at 17a). Making in-state bonds tax exempt, of course, also facilitates the raising of revenue from the citizens whom it will benefit. Otherwise, without such an exemption

> ...some issuers, such as New York City, would see their cost of issuance "skyrocket" because the benefit of double tax exemption would be gone for buyers in the city, and those buyers could put their money in "safer paper."

Karen Pierog, *Ohio's Tax On Out-of-State Bonds Spurs Suit That Worries Industry*, The Bond Buyer, Sept. 9, 1993, at p. 1 (Petition Appendix H at 35a).

Investors also rely heavily on this statutory scheme, as Petitioner herself concedes. Given the wide currency of this type of legislation, Petitioner notes that "there are literally trillions of dollars invested in in-state municipal bond funds and single-state municipal bond funds." (Petition at 9

n.3) Nationwide, the 778 single-state bond funds by themselves represent a $132 billion market. Thomas T. Vogel, Jr., *Ohio Suit Threatens Tax Advantages of Buying Single-State Muni Funds and In-State Bonds*, Wall St. J., Dec. 14, 1993, at C19 (Petition Appendix G at 31a-32a).

Petitioner's arguments for granting certiorari are not persuasive. The allegation that there is "major uncertainty" among the states over the issue (Petition at 10-11) is unsupported. As noted, there is no lower-court conflict on point. Indeed, even the entities that presumably suffer the most from the alleged Commerce Clause discrimination -- the sovereigns themselves -- have expressed no objection to these forms of subsidies. Nor does the adoption by five states of different bond schemes change things. As Petitioner concedes (Petition at 10 n.8), even these states engage in some form of subsidization of local public-works bonds. But just as importantly, for all that the record reveals, the decision by these states to tax interest on local public-works bonds is as apt to be driven by a desire to raise more revenue as by concerns about the Commerce Clause.

Unable to point to a single decision from any jurisdiction to support this alleged "major uncertainty" among the states, Petitioner is forced to rely exclusively on newspaper stories to support this point. The argument is unavailing. Not only is news coverage by itself an unusual ground for granting certiorari, but the news articles also fail on their own terms to advance Petitioner's argument. At best, they confirm that this lawsuit has application to other states, hardly a unique circumstance. At worst, they confirm the widespread reliance that Ohio and other states have placed on the validity of this longstanding practice. In the final analysis, Petitioner is simply wrong in suggesting that this is an appropriate time or an appropriate vehicle to review this issue.

II. The Commerce Clause Does Not Prohibit The States From Taxing Interest On Out-of-State Government Securities Differently From Interest On In-State Government Securities.

The courts below aptly rejected the Commerce Clause claim on the merits, further undermining Petitioner's request for review. The lower-court decisions are consistent with this Court's prior decisions in two important respects. First, the dormant or negative Commerce Clause does not limit the "commercial" actions of the sovereign itself, as opposed to actions designed to favor its citizens over citizens of another state. Second, Ohio's subsidy for in-state public-works securities fits well within the "market participation doctrine."

The key failing of Petitioner's argument on the merits is her assumption that state regulation of government participants in interstate commerce is subject to the same Commerce Clause scrutiny as state regulation of private participants in interstate commerce. That is wrong. As the state court of appeals correctly observed:

> A review of the case law developed by the United States Supreme Court demonstrates that the Commerce Clause has been directed at acts of a sovereign on behalf of its citizenry to improperly provide *its citizenry* with a competitive advantage over the *citizenry* of other states. The parties herein have provided this court with numerous Commerce Clause cases, whereby taxation schemes were challenged when a state's taxation scheme discriminated against out-of-state businesses or entities. None of the cases cited is directly on point. The instant action does not involve a

> taxation scheme whereby the citizenry of Ohio are provided with a competitive advantage over the citizenry of other states. Rather, the taxation scheme in the instant action benefits the state of Ohio itself. (citations omitted)(emphasis in original).

Shaper, 97 Ohio App.3d at 764 (Petition Appendix B at 6a-7a). *See Reeves, Inc. v. Stake*, 447 U.S. 429, 437 ("[T]he Commerce Clause responds principally to state taxes and regulatory measures impeding free private trade in the national marketplace.").

Even the cases relied on by Petitioner make this point. For example, *Boston Stock Exchange v. State Tax Commission*, 429 U.S. 318 (1977), cited at 13-14 of the Petition, involved an attempt by the State of New York to provide a competitive edge to private business, i.e., the New York Stock Exchange, by imposing a higher tax on securities transfers resulting from out-of-state sales than those resulting from in-state sales. Noting that "[t]he obvious effect of the tax is to extend a financial advantage to sales on the New York exchanges at the expense of the regional exchanges," 429 U.S. at 331, the Court found the statute undermined the "basic purpose of the Commerce Clause. Permitting the individual States to enact laws that *favor local enterprises* at the *expense of out-of-state businesses* 'would invite a multiplication of preferential trade areas destructive' of the free trade which the Clause protects." 429 U.S. at 329 (quoting *Dean Milk Co. v. Madison*, 340 U.S. 349, 356 (1951)) (emphasis added).

Similarly, *Dominion National Bank v. Olsen*, 771 F.2d 108 (6th Cir. 1985)), cited by the Petitioner at 13-14 of the Petition, involved a state tax that provided a competitive advantage for local financial institutions. There, the state

taxed the earnings from certificates of deposit issued by out-of-state financial institutions, but did not tax earnings of certificates of deposit issued by Tennessee financial institutions. The Sixth Circuit invalidated this preference for in-state private businesses:

> The only relevant issue, whether the tax on interstate commerce be direct or indirect, is whether the tax *as a practical matter* creates a direct competitive advantage for local business by discriminating against interstate commerce.

Id. at 118 (emphasis in original).

Likewise, *C & A Carbone, Inc. v. Clarkstown*, ___ U.S. ___, 114 S. Ct. 1677 (1994), cited at page 18 of the Petition, is distinguishable on these grounds. The solid waste transfer station that was the object of the preferred treatment was operated by a *private contractor, Id.* at 1680, and the Court held that "state and local governments may not use their regulatory power to favor local enterprise by prohibiting patronage of out-of-state competitors or their facilities." *Id.* at 1684. In the end, the dormant Commerce Clause simply does not prevent states from subsidizing sales of their own bonds.

In arguing to the contrary, it is clear that Petitioner argues too much. If adopted, Petitioner's novel theory of Commerce Clause discrimination would seemingly have equal application to differential taxation of Ohio municipal bonds relative to private bonds. That cannot be. Nothing in the text or underlying function of the Commerce Clause indicates that governmental bodies are compelled to compete with private business on the same terms in fulfilling the traditional governmental function of funding public works.

At bottom, the very nature of local government, together with the inherent restrictions it (but not private business) faces in raising capital, make such a requirement improper as a matter of Commerce Clause jurisprudence and implausible as a matter of common sense.

For similar reasons, Petitioner errs in claiming that the "market participation doctrine" is inapplicable here. Under that doctrine, when the sovereign participates as a consumer or vendor in commerce, its proprietary actions as a market participant are exempt from Commerce Clause scrutiny. And that is so even though the sovereign's actions may provide economic advantages to some private businesses or individuals but not others. *See Hughes v. Alexandria Scrap Corp*, 426 U.S. 794 (1976); *Reeves, Inc., supra*; *White v. Massachusetts Council of Construction Employers, Inc.*, 460 U.S. 204 (1983).

In this instance, the issuance of state or municipal bonds are the acts of a market participant, not a market regulator. *Carll v. S.C. Jobs-Economic Devel. Authority*, 327 S.E. 2d 331, 337 (S.C. 1985) (state issuing bonds and making low interest loans to state businesses); *Fidelity Guarantee Mortgage Corp. v. Conn. Hous. Finance Auth.*, 532 F. Supp. 81 (D.C. Conn. 1982) (state issuing bonds to provide funds for housing loan purposes). Nor does a state's establishment of certain parameters on the conditions of those bonds, i.e., tax exempt status, in any way alter this conclusion. Petitioner was simply mistaken in suggesting below that the "market participation doctrine" does not apply merely because the state has utilized a tax measure as an incentive to market the bonds. But the fact that the state accomplishes by a tax measure what the Petitioner has already conceded it could accomplish by contract (agreeing, for example, to provide Ohio bondholders with a higher interest rate than non-Ohio bondholders) is immaterial under

Commerce Clause scrutiny. *See*, e.g., *Shayne Bros. Inc. v. District of Columbia*, 592 F. Supp. 1128, 1133-1134 (D. D.C. 1984) ("the fact that the District has accomplished by an ordinance what it might have done by contract . . . does not alter the essence of the act. The District is expending a public resource, as much so as the money in its treasury or the services of its police, firefighters and teachers....").

Petitioner also errs in claiming that *New Energy Company of Indiana v. Limbach*, 486 U.S. 269 (1988), is to the contrary. In *New Energy*, the Court merely rejected the argument that the enactment of a tax credit scheme, affecting *private* purchases and sales of ethanol, constituted the acts of a market participant. In *New Energy* the *only* participation of the sovereign in the affected market was the enactment of a tax measure. The state neither purchased nor sold ethanol, and thus was not a market participant. That plainly is not the situation here, where the government is the issuer and seller of the bonds.

This important distinction was correctly noted by the state trial court. *Shaper v. Tracy*, Case No. 92 CVH-11-9271 (Franklin Co. C.P. November 12, 1993), *aff'd.*, 97 Ohio App. 3d 760 (1994), *app. den.*, 71 Ohio St.3d 1477 (1995), slip op. at 11 (Petition Appendix D at 23a). Regardless of the form of the state action, the Commerce Clause was not designed to "limit the ability of the States themselves to operate freely in the free market." *Reeves, Inc.*, 447 U.S. at 437. Therefore the proper focus is not on form over substance, but on whether the legislative action is directed at impeding trade among private parties or whether it is directed at governing the state's own economic conduct. *White*, 460 U.S. at 218. If the goal is the latter, as the trial court correctly found, the measure is constitutionally sound.

"The central rationale" of the Commerce Clause "is to prohibit state or municipal laws. . . that would excite those jealousies and retaliatory measures the Constitution was designed to prevent." *C & A Carbone*, 114 S.Ct. at 1682. At issue in this case is a state practice that has withstood the test of time (subsidy schemes like this one first appeared at least 100 years ago), that has been widely accepted (at least 36 other states have similar measures), that Congress has long stayed its hand in interfering with, and that has not led to the "jealousies and retaliatory measures" among the states that the clause was designed to prevent. Under these circumstances, the lower courts were correct in rejecting Petitioner's argument on the merits.[3]

---

[3] In light of the Court's recent decision in *National Private Truck Council, Inc. v. Oklahoma Tax Commission*, No. 94-688, ___ U.S. ___, 1995 U.S. Lexis 4049 (June 19, 1995), Petitioner is also incorrect in arguing that state courts are compelled to entertain section 1983 claims in state tax cases when the state (as here) already offers a remedy at law.

CONCLUSION

For the foregoing reasons, the writ of certiorari to the Ohio Tenth Appellate District Court of Appeals should be denied.

Respectfully submitted,

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June 29, 1995

APPENDIX

TABLE OF CONTENTS

Page

A. Notice Of Appeal Of Appellant *Serene G. Shaper v. Roger W. Tracy, Tax Commissioner of Ohio*, Appellee, to the Supreme Court of Ohio, Case No. 95-389 filed February 17, 1995 . . . . . 1a

B. Ohio Board of Tax Appeals Decision and Order in *Serene G. Shaper vs. Roger W. Tracy, Tax Commissioner* of Ohio, Case No. 93-X-1032 dated January 20, 1995 . . . . . 6a

C. Ohio Tax Commissioner's Final Determination In re Refund Claim No. IT-6832, *Serene G. Shaper*, dated August 6, 1993 for Personal Income Tax Years 1988 through 1991 . . . . . 12a

D. Affidavit of Michael P. Sobul, Assistant Administrator of the Ohio Tax Analysis and Local Government Distributions Division, signed December 17, 1992 (attachments omitted) 17a

APPENDIX A

[Filed Feb. 17, 1995]

IN THE SUPREME COURT OF OHIO

No. 95-389

SERENE G. SHAPER,
Appellant,

v.

ROGER W. TRACY,
Tax Commissioner of Ohio,
Appellee.

Appeal from the Ohio Board of Tax Appeals
Case No. 93-X-1032

NOTICE OF APPEAL OF APPELLANT SERENE G. SHAPER

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ATTORNEYS FOR APPELLEE
TAX COMMISSIONER

Notice of Appeal of Appellant Serene G. Shaper

Notice of Appeal. Appellant Serene G. Shaper hereby gives notice of her appeal as of right, pursuant to R.C. 5717.04, to the Supreme Court of Ohio, from a Decision and Order of the Board of Tax Appeals, journalized in case No. 93-X-1032 on January 20, 1995, affirming the tax Commissioner's denial of her refund claims for tax years 1988, 1990, 1991 and 1992. A true copy of the Decision and Order of the Board being appealed is attached hereto and incorporated herein by reference.

Errors in Decision Appealed From. The appellant complains that the Board of Tax Appeals erred in its Decision and Order by affirming the Commissioner's denial of Petitioner's Ohio income tax refund in which Petitioner: (1) asserted that Ohio income tax provision R.C. §5747.01(A)(1) on its face violates the Federal Constitution's Commerce Clause in discriminatorily taxing interest only on non-Ohio municipal bonds; and (2) sought relief for the class of all persons who similarly paid tax. The Board of Tax Appeals also erred in holding that the taxpayer had somehow failed to provide necessary documentation for her purely legal claim.

Related Appeal. The appellant has been concurrently pursuing a cause of action in the state courts for declaratory judgment on the same legal issues raised by this appeal but for subsequent tax years. That case is now before this Court on appeal from the Franklin County Court of Appeals, Tenth Appellate District Court of Appeals (Case No. 94-2439). Because the issues in these two cases are identical, this Court should consolidate these appeals. Both appeals involve the facial constitutionality under the federal Commerce Clause of the Ohio income tax provision, R.C. §5747.01(A)(1), which taxes the interest on obligations issued by non-Ohio

governmental entities while exempting any interest received on obligations issued by Ohio governmental issuers.

In each case the Defendant Tax Commissioner has defended in part, by asserting that relief can only be had in the other proceeding. Case No. 94-2439 is a discretionary appeal from the Franklin County Court of Appeals, Tenth Appellate District Court of Appeals. This appeal from the Board of Tax Appeals, however, is an appeal of right. Therefore, this Court must reach and decide the merits of this appeal.

Need for Consolidation with Related Appeal. The substantive merits of appellant's claim are extraordinarily significant. The main issue concerns the legality of a provision which produces some $25 million in annual revenue to this state. Similar provisions exist in 37 other states. If this Court affirms this appeal on the sole basis that the Board of Tax Appeals did not err in declining class action and constitutional issues, then the substantive issues of extreme importance presented in this case may receive partial or inadequate judicial review. However, if these cases are consolidated, the legal issues presented by this case will be addressed in one hearing and briefing session, and without technical procedural limits and cross-purpose arguments that separate appeals will engender, and this case will get the full and expedient attention that it deserves. Accordingly, this appeal should be noted as related to case No. 94-2437, jurisdiction in that appeal should be granted, and this appeal should be consolidated with Petitioner's appeal in No. 94-2439.

Respectfully Submitted,

/S/ Clinton A. Krislov
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Proof of Service

I certify that a copy of this Notice of Appeal was sent by certified mail to counsel for appellee, Lawrence Pratt, Assistant Attorney General of Ohio, State Office Tower, 30 East Broad Street, 16th Floor, Columbus, Ohio 43266-0410 on February 17, 1995.

/S/ Leon Friedberg
Leon Friedberg

COUNSEL FOR APPELLANT,
SERENE G. SHAPER

APPENDIX B

OHIO BOARD OF TAX APPEALS

JAN 20 1995

Serene G. Shaper,	)	
	)	
Appellant,	)	CASE NO. 93-X-1032
	)	
vs.	)	(PERSONAL INCOME
	)	TAX)
Roger W. Tracy,	)	
Tax Commissioner	)	
of Ohio,	)	
	)	DECISION AND
Appellee.	)	ORDER

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The Board of Tax Appeals considers this matter upon the appellant's September 7, 1993 Notice of Appeal. Appellant is appealing from an August 6, 1993 journal entry which denied appellant's class action refund claim. The claim related to personal income tax payments for tax years 1988, 1989, 1990 and 1991.

The appellant claims to be the owner of securities of a state or political subdivisions thereof, other than this state and its subdivisions and authorities, during the tax years in question, and claims payment of income tax on the interest earned on such securities, pursuant to R.C. 5747.01(A)(1). R.C. 5747.01(A)(1) includes as taxable income, interest generated by non-Ohio state and municipal securities. However, it exempts from taxable income, interest earned upon Ohio state and municipal securities. This differential treatment of income earned on such securities is at the heart of appellant's appeal.[1]

---

[1]Appellant cites as her authority *Chemical Waste Management, Inc. v. Hunt* (1992), 504 U.S. ___, 112 S.Ct. 2009, 119 L. Ed. 2d 121, and *New Energy Co. of Indiana v. Limbach* (1988), 486 U.S. 269, 108 S.Ct. 1803, 100 L. Ed. 2d 302, for the proposition that just as a state may not tax incoming toxic waste or ethanol either exclusively or more heavily than that produced domestically, it is identically unacceptable to tax incoming municipal bond income more heavily than that generated on Ohio bonds.

Appellant appeals with three specifications of error. First, appellant contends R.C. 5747.01(A)(1) violates the Commerce Clause of the United States Constitution. Secondly, appellant contends the Tax Commissioner erred in ruling that her claim could not be brought as a class action. Thirdly, the appellant asserts her failure to submit separate factual evidence documenting her bond income should not affect the disposition of the purely legal claims.

The appellee Tax Commissioner determined the Revised Code does not contain a mechanism for a class action income tax refund claim. The Commissioner wrote:

> "* * *
>
> "Identification of each member of the class 'similarly situated' to the applicant would be a near impossibility, and the confidentiality of each taxpayer's tax information required by R.C. 5747.18 would be jeopardized through the forced inclusion into a class action refund claim and potential representation by someone not selected by the individual taxpayer. * * *
>
> "* * *"
>
> (ST. 23)

The Commissioner also found the appellant failed to provide information substantiating her Commerce Clause claim.

We consider this cause and matter upon the appellant's notice of appeal, the stipulation of facts submitted jointly by the parties, the transcript certified to the board by the Tax Commissioner, and the written legal arguments and additional authority submitted by the parties.

The stipulation of facts and the notifications of additional authority relate to the somewhat complicated civil proceedings concerning the same issues now before this Board. The appellant is concurrently pursuing a cause of action in the state courts. Most recently, the Franklin County Court of Appeals, in *Shaper v. Tracy, Tax Commissioner* (Sept. 29, 1994), Franklin App. No. 94APE0132, unreported, affirmed summary judgment entered by the Common Pleas Court. In the trial court, Judge Stratton held that the Commerce Clause has not been applied to acts of a sovereign on behalf of itself[2] (as opposed to its citizenry), which provided the sovereign with a competitive advantage over another sovereign.[3]

The appellant appealed the Franklin County Court of Appeals decision to the Supreme Court of Ohio on November 16, 1994, and the appellee Commissioner cross-appealed on November 30, 1994. The case appears on the Ohio Supreme Court's docket as case number 94-2439. The case is currently pending a determination of jurisdiction, upon the

---

[2]J. Stratton noted Commerce Clause cases deal with a state involvement or protection of private enterprise that in some way favors a private entity within a state, over an out-of-state industry. Stratton wrote: "*** neither the Supreme court nor any case law examined has applied the Commerce Clause to actions between government entities. Each state has a legitimate interest in tapping a major source of tax revenue while adding an incentive for investors to purchase state bonds."

[3]In so finding, J. Stratton granted appellee Commissioner's Motion for Summary Judgment, and also found the following: the appellant may maintain an action in Common Pleas Court for declaratory relief, the appellant is not first required to exhaust her administrative remedies before seeking declaratory relief, and the appellant does not have the right to maintain a 42 U.S.C. sec. 1983 action in Ohio state courts.

allowance of a claimed appeal of right, or a discretionary appeal.

Returning to the appeal before us, the appellant has aptly noted this Board is an administrative board, lacking the jurisdiction to determine the facial constitutionality of a statute. *S.S. Kresge Co. v. Bowers* (1960), 170 Ohio St. 405, paragraph one of the syllabus; *Herrick v. Kosydar* (1975), 44 Ohio St. 2d 128, 130; *Roosevelt Properties Co. v. Kinney* (1984), 12 Ohio St. 3d 7, 8; *Cleveland Gear Co. v. Limbach* (1988), 35 Ohio St. 3d 229, paragraph one of the syllabus.

In *Herrick, supra*, plaintiffs brought in Common Pleas Court, a class action on behalf of former state employees, seeking a declaratory judgment that two state tax statute amendments were unconstitutional. The Supreme Court held the Common Pleas Court did have jurisdiction to render a declaratory judgment, despite alternative administrative remedies provided by R.C. Title 57. The Court wrote:

> "* * * administrative proceedings in this case would be futile preludes to the assertion of plaintiffs' actual claim in a later appeal to the courts. Administrative proceedings could not provide or even consider the relief sought by these plaintiffs. * * *"

These observations are equally applicable in this case. As such, we defer ruling upon appellant's claim questioning the constitutional validity of R.C, 5747.01(A)(1), on the basis that this Board is without jurisdiction to make such a declaration.

We affirm the Tax Commissioner's finding that R.C. 5747.11 does not provide for class action refund claims. We

affirm the commissioner's finding that appellant has failed to provide any information substantiating her claim for refund for payment of tax upon income earned upon securities issued by states and subdivisions thereof, other than this state.

Therefore, it is the Decision of the Board of Tax Appeals that the journal entry of the Tax Commissioner should be, and hereby is, affirmed.

I hereby certify the foregoing to be a true and correct copy of the action of the Board of Tax Appeals of the State of Ohio, this day taken, with respect to the above matter.

/S/ Kiehner Johnson, Chairman
Kiehner Johnson, Chairman

APPENDIX C

STATE OF OHIO
DEPARTMENT OF TAXATION

AUG 06 1993

FINAL DETERMINATION

In re Refund Claim No. IT-6832

Serene G. Shaper
2630 South Green Road
University Heights, Ohio 44122-1536

Personal Income Tax
Tax Years: 1988, 1989, 1990 and 1991

This matter involves a claim under R.C. 5747.11 for refund of $6,001.86.

The applicant contends that she is seeking the subject refund claim as a member of a class consisting of herself and "all others similarly situated" and that she is challenging *Herrick v. Kosydar* (1975), 44 Ohio St. 2d 128 and its holding that "class refund claims are not allowable." The applicant further contends that pursuant to *Chemical Waste Management, Inc. v. Hunt* (1992), 504 U.S. __, 119 L. Ed. 2d 121, 112 S. Ct. ____, R.C. 5747.01(A)(1) violates the Commerce Clause because it does not subject to Ohio personal income taxation interest generated by Ohio bonds, but does subject to such taxation interest generated by non-Ohio bonds. The applicant's contentions are not well taken.

The applicant's attempt to file a class action refund claim for the alleged illegal or erroneous payment of Ohio income taxes is not allowed. The controlling statute in the Ohio Revised Code providing for the refund procedure, i.e., R.C. 5747.11, does not allow for a class action refund claim. Identification of each member of the class "similarly situated" to the applicant would be a near impossibility, and the confidentiality of each taxpayer's tax information required by R.C. 5747.18 would be jeopardized through the forced inclusion into a class action refund claim and potential representation by someone not selected by the individual taxpayer. In essence, along with concerns for the potential of an administrative quagmire and a breach of confidentiality, the Ohio Revised Code does not contain a mechanism for a class action income tax refund claim. The applicant's refund application can only be considered as an application for the individually named taxpayer.

Further, while the applicant stated that she is challenging *Herrick v. Kosydar*, *supra*, for the proposition that class refund claims are not allowable, the issue in that case was whether the county common pleas court had jurisdiction to issue a declaratory judgment when an administrative remedy was available. The Court held that the common pleas court did have such jurisdiction. The only comment the Court made regarding refund claims and class actions was that considering that the class action in that case consisted of 40,000 claimants seeking refund of income taxes paid on state pension or retirement allowances, "[a]dministrative remedies would require each of those claimants to file a separate refund application, a requirement which can hardly be considered an equally serviceable alternative to a single declaratory judgment action." *Id.* at 130, 131. While not the holding, this statement by the Court does offer support to the Department of Taxation's position that income tax refund claims must be made by the individual taxpayer.

The applicant's Commerce Clause contention is also without merit. *Chemical Waste Management, supra,* dealt with a hazardous waste disposal fee that was imposed by the State of Alabama on hazardous waste generated outside Alabama but brought into the state for disposal at a commercial facility. The Supreme Court held that the legislation enacting the fee violated the Commerce Clause because it discriminated against out-of-state commerce, i.e., the legislation imposed a fee on hazardous waste from outside Alabama but did not impose the same fee on similar hazardous waste created in Alabama. A glaring lack of factual similarity exists between *Chemical Waste Management* and the instant case. Further, in *Chemical Waste Management* the Commerce Clause was violated because of legislation that was economic protectionism in the guise of environmental regulation. Economic protectionism does not exist here.

The Supreme Court has long held that when an individual state participates as a consumer or vendor in commerce, it is a market participant and not a market regulator and its actions are therefore exempt from Commerce Clause analysis, even if its actions incidentally result in economic advantages to the state's private sector. See *Hughes v. Alexandria Scrap Corp.* (1976), 426 U.S. 794; *Reeves, Inc. v. Stake* (1980), 447 U.S. 429; *White v. Massachusetts Council of Construction Employers, Inc.* (1983), 460 U.S. 204; and *South-Central Timber Development, Inc. v. Wunnickl* (1984), 467 U.S. 82. As a bond issuer, the State of Ohio is a market participant. As such, it is within its right to provide, as do approximately thirty-six states and the District of Columbia, an exemption for its own bonds that is not available for other states' bonds. The propriety of this right has been supported by the Supreme Court in *White v. Massachusetts Council of Construction Employers, Inc., supra*:

> The line between regulation and market participation, for purposes of the Commerce Clause, should be drawn with reference to the constitutional values giving rise to the market participant exemption itself. As the Court recognized in *Reeves*, the most important of these is that historically the "Commerce Clause responds principally to state taxes and regulatory measures impeding free private trade in the national marketplace"; it was not designed "to limit the ability of the States themselves to operate freely in the free market." *Reeves*, 447 U.S., at 437, 100 S. Ct., at 2277. The Court also observed that the distinction between participation and regulation rests on core notions of state sovereignty, coupled with the traditional right of private traders to determine the identities of their bargaining partners free from governmental interference. *Id.*, at 438-439, 100 S.Ct., at 2279. The legitimacy of a claim to the market participant exemption thus should turn primarily on whether a particular state action more closely resembles an attempt to impede trade among private parties, or an attempt, analogous to the accustomed right of merchants in the private sector, to govern the State's own economic conduct and to determine the parties with whom it will deal.
>
> *Id.* at 218.

Additionally, though additional information was requested three times from the applicant, she failed to provide any information substantiating her claim of a Commerce Clause violation by R.C. 5747.01(A)(1). Usually the party

challenging a statute must prove discrimination and economic protectionism. *Hughes v. Oklahoma* (1979), 441 U.S. 322. The applicant has merely claimed in her application that a Commerce Clause violation exists, but has refused to offer any substantive evidence of such. Indeed, the applicant has refused even to submit information that would allow the Department of Taxation to determine the source of income claimed by her to be non-Ohio income reported on line 25 and federal income reported on line 30 of the Ohio tax returns for each tax year at issue. Without the cooperation of the applicant and without her supporting her claims with substantive evidence, there is no alternative but to deny the refund claim.

Accordingly, the subject refund claim is denied.

THIS REFLECTS THE TAX COMMISSIONER'S FINAL DETERMINATION WITH REGARD TO THE SUBJECT MATTER. UPON EXPIRATION OF THE THIRTY-DAY APPEAL PERIOD PRESCRIBED BY R.C. 5717.02, THIS MATTER WILL BE CONCLUDED AND THE FILES APPROPRIATELY CLOSED.

I HEREBY CERTIFY THE FOREGOING
TO BE A TRUE AND CORRECT COPY OF
THE ACTION OF THE TAX COMMISSIONER
TAKEN THIS DAY WITH RESPECT TO THE
ABOVE MATTER.

/S/ ROGER W. TRACY

Roger W. Tracy
Tax Commissioner

/S/ Roger W. Tracy

ROGER W. TRACY
TAX COMMISSIONER

APPENDIX D

COURT OF COMMON PLEAS
FRANKLIN COUNTY, OHIO

Case No. 92CVH-11-9271
Judge Stratton

SERENE G. SHAPER,
Plaintiff,

v.

ROGER W. TRACY, TAX COMMISSIONER OF OHIO,
Defendant.

AFFIDAVIT

STATE OF OHIO)
): SS
COUNTY OF FRANKLIN)

I, Michael P. Sobul, being duly sworn, state that the following is true to the best of my knowledge and belief.

The Tax Analysis and Local Government Distributions Division (formerly the Research and Statistics Division) of the Ohio Department of Taxation houses the library and historical documents of the department. I am the Assistant Administrator of that division and have made the attached copies of the following documents stored there as official records:

1. A copy of the cover and first four pages of the Ohio Tax Study Commission Report 1967 to the 107th General Assembly.

2. An abstract from the Legislative Service Commission dated April 30, 1970, of the testimony by Dr. Frederick Stocker on March 17, 1970 to the House Ways and Means Committee.

3. A Memorandum dated December 16, 1992 from Dr. Frederick Stocker concerning his testimony in item 2.

In my capacity as Assistant Administrator, I also have access to and am responsible for working with the department's records of annual revenue derived and/or outstanding from state income tax. Accessing these records, I have determined that approximately twenty million dollars ($20,000,000.00) was derived and/or is outstanding from non-Ohio governmental obligation interest and dividends reported on Ohio income tax returns for year 1989.

Further, affiant sayeth naught.

/S/ Michael P. Sobul

Sworn to and subscribed in my presence this 17th day of December, 1992.

/S/ Lawrence D. Pratt
Notary Public

LAWRENCE DWIGHT PRATT,
Attorney-At-Law
NOTARY--STATE OF OHIO
My commission has no
expiration date.
Section 147.03 R.C.

Supreme Court, U.S.
FILED
JUL 14 1995
CLERK

(3)

No. 94-1950

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

SERENE G. SHAPER,
Petitioner,
v.
ROGER W. TRACY,
Tax Commissioner of Ohio,
and
BETTY MONTGOMERY,
Attorney General of Ohio,
Respondents.

On Petition for a Writ of Certiorari to the Ohio Tenth Appellate District Court of Appeals

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii
I. THE PUBLISHED ARTICLES REFLECT THE EXTREME IMPORTANCE OF THE ISSUE AS WELL AS THE GENERAL RECOGNITION THAT THE DISCRIMINATION CANNOT STAND	1
A. The Legal Scholars Long Ago Questioned the Discrimination and Found It Untenable	2
B. The Financial Community's Expressed Concern	2
C. The Actual Impact on the Market	3
II. THERE IS NO INDEPENDENT STATE GROUND FOR AFFIRMANCE OF THE DECISION BELOW	4
III. THIS COURT HAS CONSISTENTLY AND ACTIVELY ELIMINATED DISCRIMINATORY STATE EFFORTS TO PROTECT LOCAL INTERESTS	4
IV. OHIO IS NOT A MARKET PARTICIPANT IN ITS TAXING BONDS, THUS NOT EXCEPTED FROM THE COMMERCE CLAUSE	5
V. RESPONDENTS' ARGUMENT TO DUCK THIS CASE IN FAVOR OF THE SEPARATE TAX REFUND CLAIM PROCEEDINGS FOR DIFFERENT YEARS IS THE RESPONDENTS' EFFORT TO PREVENT ANY REVIEW AT ALL	5
VI. RESPONDENTS' ARGUMENT THAT THE DISCRIMINATION IS A FUNCTION OF THE OHIO CONSTITUTION, THEREFORE AFFORDED SPECIAL PROTECTION UNDER THE COMMERCE CLAUSE, IS UNTRUE AND HAS NO BASIS IN LAW	7

TABLE OF CONTENTS—Continued

Page

VII. PETITIONER'S OUT-OF-STATE BONDS ARE IRRELEVANT TO THE ISSUES IN THIS CASE 9

CONCLUSION 10

TABLE OF AUTHORITIES

CASES — Page

Bonaparte v. Tax Court, 104 U.S. 592 (1881) 4, 5
Brooke Group Ltd. v. Brown & Williamson Tobacco Corporation, 113 S.Ct. 2578 (1993) 3
Brown Shoe Co. v. United States, 370 U.S. 294 (1962) 3
Davis v. Michigan Dept. of Treasury, 489 U.S. 803 (1989) 6
Harper v. Virginia Dept. of Taxation, 113 S.Ct. 2510 (1993) 6, 7
Layne & Bowler Corporation v. Western Well Works, 261 U.S. 387 (1923) 3
McKesson Corp. v. Division of Alcoholic Beverages and Tobacco, Fla. Dept. of Business Regulation, 496 U.S. 18 (1990) 6, 7
National Private Truck Council, Inc. v. Oklahoma Tax Commission, 1995 WL 360189 (U.S. Okla. June 19, 1995) 7
New Energy Co. of Indiana v. Limbach, 486 U.S. 269 (1988) 5
Reich v. Marcus E. Collins, 115 S.Ct. 547 (1994) .. 6, 7
Rice v. Sioux City Memorial Park Cemetery, Inc., 349 U.S. 70 (1955) 3
Shaper v. Tracy, 97 Ohio App.3d 760 (1994) 5
U.S. Term Limits, Inc. v. Ray Thornton, 115 S.Ct. 1842 (1995) 3, 4

CONSTITUTIONAL PROVISIONS AND STATUTES

Commerce Clause of the United States Constitution, Article I, Section 8, Clause 3 ..... *passim*
Supremacy Clause of the United States Constitution, Article VI, Clause 2 9
Ohio Revised Code § 5747.01(A)(1) ..... *passim*
Ohio Constitution, Article VIII, §§ 2b, 2c, 2f, 2g, 2i, 2k 16 8

TABLE OF AUTHORITIES—Continued

OTHER AUTHORITIES — Page

James F. Blumstein, *Some Intersections of the Negative Commerce Clause and the New Federalism: The Case of Discriminatory State Income Tax Treatment of Out-of-State Tax-Exempt Bonds*, 31 Vanderbilt Law Review 473 (1978) 2

James F. Blumstein, *Discriminatory State Income Tax Treatment of Out-of-State Tax-Exempt Bonds*, 15 Municipal Finance Journal 53 (1994) .. 2

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

No. 94-1950

SERENE G. SHAPER,

Petitioner,

v.

ROGER W. TRACY,
Tax Commissioner of Ohio,

and

BETTY MONTGOMERY,
Attorney General of Ohio,

Respondents.

On Petition for a Writ of Certiorari to the Ohio Tenth Appellate District Court of Appeals

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PETITIONER'S REPLY BRIEF

Respondents' Brief actually acknowledges the fact that the tax issue is one of utmost public importance, but argues for declining the case by pure misstatements of the law.

I. THE PUBLISHED ARTICLES REFLECT THE EXTREME IMPORTANCE OF THE ISSUE AS WELL AS THE GENERAL RECOGNITION THAT THE DISCRIMINATION CANNOT STAND.

Respondents' primary argument is that this is an issue of first impression, that the discrimination has become ingrained in law and should not be reviewed until after more cases percolate up, perhaps after a conflict develops.

As we have shown in our petition for certiorari at 15, this issue is the certain next step in a subject-area in which this Court frequently rules. The mere fact that this practice has not been challenged before certainly does not make it constitutional.

A. The Legal Scholars Long Ago Questioned the Discirmination and Found It Untenable.

This facial discrimination against commerce was long ago recognized, analyzed and concluded to be certainly invalid by the primary legal scholar in this subject area:

> . . . under a conventional commerce clause analysis, the present tax exemptions discriminate against interstate commerce and, in view of the availability of reasonable, nondiscriminatory alternatives, the discrimination cannot be justified on the ground that the statutes further a legitimate state purpose." James F. Blumstein, *Some Intersections of the Negative Commerce Clause and the New Federalism: The Case of Discriminatory State Income Tax treatment of Out-of-State Tax-Exempt Bonds,* 31 Vanderbilt Law Review 473, 564 (1978).

Just last year, Professor Blumstein revisited the issue and concluded that the discrimination fares no better under current Commerce Clause decisions:

> "The analysis in the article indicated that such discriminatory treatment of out-of-state tax-exempt income violates the Commerce Clause, as interpreted by the United States Supreme Court. Since 1978, the case law decided by the Supreme Court has strengthened that conclusion."

James F. Blumstein, *Discriminatory State Income Tax Treatment of Out-of-State Tax-Exempt Bonds,* 15 Municipal Finance Journal 53, 53-54 (1994).

B. The Financial Community's Expressed Concern.

Contrary to Respondents' assertion, the financial newspaper articles are *not* submitted to support the legal

merits of our position. The importance of the financial news media's interest in this case shows its great public importance and interest, a matter which this Court has routinely indicated as a key reason to grant writs of certiorari.[1]

C. The Actual Impact on the Market.

Respondents' disingenuous contention that uniform tax treatment of bonds (whether taxable or tax-exempt) would be detrimental to the municipal bond *market* is transparently a non sequitur. Elimination of home state-tax discrimination would make *all* municipal bonds immediately marketable nationwide, probably increasing the sales of all municipal bonds. More fundamentally, the argument that balkanizing the Republic into 50 tax duchies, each one *per force* "centering" the market(s) for municipal bonds as 50 local advantage markets is antithetical to both the purpose of the Commerce Clause[2] and the Constitution itself, whose basic view is that the Republic is one nation of people, no longer a Confederation of 50 independent States.[3]

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[1] *See Layne & Bowler Corporation v. Western Well Works*, 261 U.S. 387, 393 (1923), a patent infringement dispute, the Court held that, ". . . it is very important that we be consistent in not granting the writ of certiorari except in cases involving principles the settlement of which is of importance to the public, as disinguished from that of the parties . . ." *See also Rice v. Sioux City Memorial Park Cemetery, Inc.*, 349 U.S. 70, 79 (1955).

[2] In the antitrust field, the Court routinely points out that the Commerce Clause and the antitrust laws passed thereunder are to favor and protect competition, not competitors. *See Brown Shoe Co. v. United States*, 370 U.S. 294, 320 (1962), *Brooke Group Ltd. v. Brown & Williamson Tobacco Corporation*, 113 S.Ct. 2578, 2588 (1993).

[3] *See U.S. Term Limits, Inc. v. Ray Thornton*, 115 S.Ct. 1842, 1855 (1995), a term limits case, this Court held, ". . . the Framers envisioned a uniform national system, rejecting the notion that the nation was a collection of States, and instead creating a direct

II. THERE IS NO INDEPENDENT STATE GROUND FOR AFFIRMANCE OF THE DECISION BELOW.

There is great reason for the Court to take this case since there is no sustainable state ground for affirmance. Respondents never dispute the fact that this is a pure federal constitutional issue which the State Courts cannot fairly decide. This case presents a purely federal constitutional question. In spite of Respondents' interest in obviating review by a State law based dismissal, none of the courts below could find one. If there were an independent state ground on which the decision could be sustained, the courts below would have done so. Plainly, no such independent state ground exists. Therefore, this Court should address the constitutionality of Ohio R.C. § 5747.01(A)(1) as it clearly presents a federal constitutional question.

III. THIS COURT HAS CONSISTENTLY AND ACTIVELY ELIMINATED DISCRIMINATORY STATE EFFORTS TO PROTECT LOCAL INTERESTS.

This Court has never consciously abided a discriminatory tax scheme that was enacted to protect local interests. Respondents' misdescribe *Bonaparte v. Tax Court*, 104 U.S. 592 (1881), as implicitly validating a similar legislative scheme as the one that exists in this case. Respondents' Brief at 3. *Bonaparte* did no such thing. Rather, it rejected the authority of a state bond issuer (one which exempts its own obligations) to force another state to exempt its interest payments from tax upon holders' who reside in the "recipient" state. *Id.* *Bonaparte's sole* relevance here is that a State has no special powers when it is acting for its own interests, unequivocally declaring that when a state sells in the marketplace, it has no attributes of sovereignty as to the debt it owes, that "it is compelled to go into the market

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link between the National Government and the people of the United States."

as a borrower, subject to the same disabilities . . . as individuals." *Id.* at 595.

IV. OHIO IS NOT A MARKET PARTICIPANT IN ITS TAXING BONDS, THUS NOT EXCEPTED FROM THE COMMERCE CLAUSE.

Throughout this litigation, Respondents' have repeatedly argued that Ohio is a market participant in taxing the out-of-state bonds. This is the one issue that the Court of Appeals below answered correctly, holding that Ohio is not a market participant, in its taxing the bonds.

The market participant doctrine is a limited exemption from Commerce Clause restrictions for states' actions in buying or selling goods or services as market participants, distinct from their actions as governmental market regulators. The Court of Appeals stated:

> . . . Clearly, when a state chooses to sell bonds and enter into the securities market, it is acting as a market participant. However, when a state chooses to tax its citizens, it is acting as a market regulator . . . *Shaper v. Tracy*, 97 Ohio App.3d 760, 763-64 (1994).

The Court of Appeals soundly relied on *New Energy Co. of Indiana v. Limbach*, 486 U.S. 269 (1988), which resolutely declared that the assessment and computation of taxes is "a primeval governmental activity." *New Energy*, 486 U.S. at 277. Respondents' contention that it is a market participant in taxing bonds of other states with whom it is competing is a proposition recognized nowhere except in the Ohio State court decision below.

V. RESPONDENTS' ARGUMENT TO DUCK THIS CASE IN FAVOR OF THE SEPARATE TAX REFUND CLAIM PROCEEDINGS FOR DIFFERENT YEARS IS THE RESPONDENTS' TACTICAL EFFORT TO PREVENT ANY REVIEW AT ALL.

Respondents' statement that Petitioner is involved in a parallel tax refund action pending in the state courts

for different tax years, fails to mention that this has been the Respondents' strategic maneuver to prevent any court from deciding the issue at all.

Respondents requested that the Ohio Supreme Court decline to exercise its discretionary jurisdiction in this declaratory case appeal in order to hear the issues instead in the mandatory jurisdiction tax refund litigation. However, its pending Motion to the Ohio Supreme Court on the mandatory jurisdiction appeal now asserts that the Ohio Supreme Court is precluded from adjudicating that case under the doctrines of collateral estoppel and/or res judicata because it declined to hear this case!

Such a "shell game" theory of tax litigation is untenable. Due Process and the judicial system are not to be run as the State's carnival game, in which the litigants against the State are strategically doomed by legerdemain, in which the taxpayer is first declined under Shell No. 1 (because Shell No. 2 is preferred), but then must lose under Shell No. 2, because she was declined under Shell No. 1.

Due Process requires a means by which taxpayers can obtain redress. In *Reich v. Marcus E. Collins*, 115 S.Ct. 547 (1994), this Court expressed its exasperation and the end of its tolerance for the many State Supreme Courts' efforts to thwart refunds which are legitimately owed.[4] While due process allows a State to maintain a

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[4] Georgia, like numerous other states, had taxed retirement benefits paid to federal retirees while exempting those paid to its state retirees, prior to the decision in *Davis v. Michigan Dept. of Treasury*, 489 U.S. 803 (1989). Georgia then repealed its state retiree tax exemption, but opposed refunding federal retirees the unconstitutional taxes they had paid before the Court's 1989 decision in *Davis*. Even after *Harper v. Virginia Dept. of Taxation*, 113 S.Ct. 2510 (1993), the Georgia Supreme Court sought to thwart refunds under its own refund statute where the law under which the taxes were assessed and collected was itself subsequently declared to be invalid. It then denied Reich's petition seeking reconsideration under *McKesson Corp. v. Division of Alcoholic Beverages and*

remedial scheme that is either exclusively predeprivation, exclusively postdeprivation, or a hybrid, and may reconfigure it over time to fit changing needs, it may *not* unfairly configure the process to prevent any recovery at all. *Id.* at 548. In an extremely irate opinion, the Court condemned Georgia's bait-and-switch tactics in refusing the taxpayer's claimed refund because of a Georgia refund statute enacted after the tax was assessed and collected. Justice O'Connor, for a unanimous Court, castigated Georgia's holding out what appeared to be a clear and certain postdeprivation remedy, only to declare, *after* a taxpayer has paid the disputed taxes, that the remedy no longer existed. *Id.* at 550-51.[5]

VI. RESPONDENTS' ARGUMENT THAT THE DISCRIMINATION IS A FUNCTION OF THE OHIO CONSTITUTION, THEREFORE AFFORDED SPECIAL PROTECTION UNDER THE COMMERCE CLAUSE, IS UNTRUE AND HAS NO BASIS IN LAW.

Respondents' assertion that the source of this discrimination ought to be permitted because it arises from the

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Tobacco, Fla. Dept. of Business Regulation, 496 U.S. 18 (1990) and similar cases, which establish that due process requires a "clear and certain" remedy for taxes collected in violation of federal law, and that a State may provide that remedy before the disputed taxes are paid (predeprivation), after they are paid (postdeprivation), or both. *Id.* Reich petitioned for certiorari, and the Court remanded for further consideration in light of *Harper v. Virginia Dept. of Taxation*, which had relied on *McKesson* in circumstances similar to this case. In again denying Reich's refund claim, the Georgia Supreme Court reviewed Georgia's predeprivation remedies and found those remedies to be ample, but not available to him and again rejected his claim. The taxpayer again petitioned for certiorari.

[5] *National Private Truck Council, Inc. v. Oklahoma Tax Commission*'s elimination of § 1983 as a vehicle to challenge state tax provisions makes it difficult enough for any but the wealthiest taxpayers. —— U.S. ——, 1995 WL 360189 (U.S. Okla. June 19, 1995). The Court should not condone strategic State efforts to render it entirely impossible.

Ohio Constitution and is not solely a function of statute, has no legal basis and is not true. In fact, while the Ohio Constitution contains provisions prohibiting tax on certain types of Ohio bonds, there is no overall provision exempting all Ohio bonds from taxation. Respondents indeed cite to no Ohio Constitutional provision that excludes *all* Ohio bonds from taxation. Respondents' Brief at 2.[6] There is *no* provision in the text of the Ohio Constitution that prohibits the taxation of interest earned on all Ohio municipal bonds. Therefore, the opposite of what the Respondents assert is indeed true: this discrimination is *solely* a function of the Ohio Tax Code's statutory definition of Ohio adjusted gross income for taxation.[7]

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[6] In their Brief, Respondents' cite to seven sections of the Ohio Constitution. Analysis shows that each of these provisions excludes from taxation only the type of bond mentioned in the title of the provision, and they do not prohibit tax on Ohio general obligation bonds, in particular.

Art. VIII, § 2b	Adjusted compensation for service in World War II.
Art. VIII, § 2c	Construction of state highway system.
Art. VIII, § 2f	Authorizing bond issue to provide school classrooms, support for universities, for recreation and conservation and for state buildings.
Art. VIII, § 2g	Authorizing bond issue or other obligations for highway construction.
Art. VIII, § 2i	Capital improvement bonds.
Art. VIII, § 2k	Issuance of general obligations of the state to finance local government public infrastructure capital improvements.
Art. VIII, § 16	Financing housing for individuals and families by state and political subdivisions. Respondents' Brief at 2.

[7] R.C. § 5747.01(A)(1), the statute being challenged by the Petitioner defines:

But even if it was the Ohio Constitutional provisions that were the source of this discrimination, those provisions would be no less subject to the federal Commerce Clause or the Supremacy Clause. The Supremacy Clause provides that the Constitution and Laws of the United States which shall be made in pursuance thereof . . . shall be the supreme law of the land. U.S. Const., Art. VI, cl. 2. Under the Supremacy Clause, the Constitution and laws of the United States are supreme over State Constitutions and State Laws. U.S. Const., Art. VI, cl. 2. Therefore, even if the discrimination was mainly or solely a function of the Ohio Constitution, it would still be invalid. The notion that a State can preempt the federal Constitution simply by putting a provision in its own constitution is a matter that this Court would want to address in order to prevent the concept from acquiring any legitimacy at all.

VII. PETITIONER'S OUT-OF-STATE BONDS ARE IRRELEVANT TO THE ISSUES IN THIS CASE.

Petitioner's out-of-state bond holdings were never requested in this case, and have no relevance to any of the issues presented. Respondents state that the record contains only copies of Petitioner's Ohio income tax returns. In fact, this is all the record needs to contain. Because this is a declaratory judgment action, the nature of the out-of-state obligations on which tax was paid is totally irrelevant. The question here is whether the State of Ohio

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(A) "Adjusted gross income" means adjusted gross income, as defined and used in the Internal Revenue Code, adjusted as follows:

(1) Add interest or dividends on obligations or securities of any state or of any political subdivision or authority of any state, other than this state and its subdivisions and authorities; . . . Ohio R.C. § 5747.01(A)(1).

The discrimination results from the requirement in § 5747.01(A)(1) that interest on obligations or securities of any State, *other than the State of Ohio*, is included in the taxpayer's adjusted gross income.

has the right to tax the interest on out-of-state bonds while it consciously chooses not to impose tax on the interest from Ohio obligations. Clearly, the detail of Petitioner's out of state bonds has no relevance in determining the answer to this question.

In fact, in the parallel tax refund case, the Tax Commissioner acknowledged that the nature of the Petitioner's holdings had no bearing on any decision it would render. Appendix at 3a. If the Tax Commissioner acknowledged that the nature of the bonds were completely unnecessary for resolution of the tax refund case, *a fortiori,* they certainly have no relevance here, in the declaratory action.

CONCLUSION

This case presents a Commerce Clause challenge to Ohio's practice of taxing the interest on out-of-state municipal bonds while exempting the interest on its own in-state municipal bonds. The outcome of this case affects the future of the nationwide municipal bond market enormously.

Accordingly, the petition for writ of certiorari to the Ohio Appellate Court should be granted.

Respectfully submitted,

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APPENDIX

BOARD OF TAX APPEALS
STATE OF OHIO

Case No. 93-G-1032

SERENE G. SHAPER,
Appellant,

vs.

ROGER W. TRACY, TAX COMMISSIONER OF OHIO,
Appellee.

Tuesday, April 19, 1994

Met, pursuant to assignment, at 1:40 o'clock p.m.

BEFORE: Linda Moss-Edwards, Attorney-Examiner.

APPEARANCES:

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CROSS-EXAMINATION

BY MR. DE LONE:

Q Mr. Sherman, you're an attorney?

A Yes.

Q Admitted to the Ohio Bar when?

A 1974. Autumn of '74.

Q Okay.

A I'm sorry. That's a mistake. That's when I got out of undergraduate. It would be autumn of '76.

Q And you examined the—Well, let me ask you: You were not the internal auditor that was requesting this information concerning this application for refund, were you?

A That's correct.

Q That was Mr. Bialczak?

A No, it wasn't Mr. Bialczak. The internal auditors were requesting information prior to Mr. Bialczak. My understand is they made the first request, and subsequently Bialczak made a request.

Q Then Bialczak made another request, and this is a letter dated April 129, 1993 which is, I believe, page 42 of the Statutory Transcript?

A I can't confirm that.

Q I understand, but you're familiar with that letter?

A Yes, sir.

Q You saw it?

A Yes, sir.

Q And you are familiar with the application for tax refund filed by Ms. Shaper?

A Yes, sir.

Q And fundamentally, what you're really saying is, isn't it, when you talk about mathematical errors, that in order to determine the amount of refund, if a refund was applicable, you needed to verify the amount she claimed as both interest income on these particular securities and the amount of tax she paid, Ohio tax?

A We would verify the numbers, yes, relating to that.

Q Sure. Now, you did examine the return, and, presumably, other members of the department examined the application for refund?

A Oh, you're asking me that?

Q Sure.

A At the time that the refund request first came to our building, no, I did not examine that at that the time.

Q Somebody actually did, however?

A My understanding is that at least two somebodies did, two agents.

Q And you have since seen it?

A Yes, sir.

Q And from the standpoint of the issues, that is whether or not it's in violation of Section 8 of Article 1 of the Constitution of the United States that is the statute giving exempt status to Ohio securities—municipal securities and the other issues concerning class action refund claims, this information that the department personnel wanted would have no bearing whatsoever on the determination by the Commissioner of those two issues, would it?

A I'm sorry. Could you restate the question? I'm not sure I understand.

Q The additional information requested by the department's staff auditors would have no bearing whatsoever, would it, on the allowance or disallowance of the refund claim based on the two issues raised by the taxpayer?

A Those two issues again are?

Q The Commerce Clause, which was raised in the Notice of Appeal—The federal constitutional questions, let's put it that way, equal protection and Commerce Clause and the question of the statute that you operate under with regard to refund which you believe does not permit you to handle class applications.

A Right. The documentation we requested would not have addressed those two issues.

Q So it was immaterial at that point unless the department was going to grant the refund, and then you would need to know how much money the lady was entitled to?

A When we are going to issue a refund—

Q Sure.

A —we would need documentation.

Q Do you have any idea who in the department's legal staff wrote the Commissioner's final determination order?

A Who actually wrote it?

Q Yes.

A I have an understanding, but I can't tell you who actually wrote the final determination.

Q Who do you think wrote it?

A That Hearing-Examiner Bialczak was involved with the writing on that.

Q Isn't it common practice when the legal department drafts tentative determinations where they are denying the taxpayer's or—yes, the taxpayer's petition, whether it be in an assessment or refund, that the examiner generally puts in what is sometimes referred to in the practice as "the kitchen sink," in order to put the Tax Commissioner in the best position to be upheld by the Board or the courts?

A I really can't speak to what is the common practice in the legal division with respect to denying refunds.

Q But you know that happens, what I just said?

A I can't say that it always happens or never.

Q But it does?

A I would imagine it has probably happened.

Q But certainly to decide the issues, and if you look at the application for refund, the issues are clear that the Tax Commissioner is raising, aren't they, the constitutional challenge and the class refund claim?

A As with the taxpayer?

Q Yes.

A Before I definitely say it, I would like to reread it.

Q Sure. I think that's a copy of what we filed that's in the transcript (indicating).

A The first challenge is the Commerce Clause challenge, differential treatment of United States Bond.

Q Go ahead.

A The second says, "Commerce Clause" here, and the No. 2 as far as—Reason No. 2 is called the class refund claim.

Q So that was clear?

A Yes.

Q And this application could have been simply turned down on the basis of Herrick versus Kosydar and on the basis of the cases that were cited in the Tax Commissioner's final determination with respect to the federal constitutional challenge; isn't that true?

A We ask for documentation to support the refund.

Q Isn't it true that the Commissioner could turn it down on the basis he has no authority to rule on the constitutional issue and on the basis that the statute doesn't provide for class action refunds?

A I don't know if I can really answer that question.

Q Okay. That's all right.

MR. DE LEONE: Let me see if I have anything else, Ms. Edwards. I think I'm about through.

BY MR. DE LEONE:

Q From what you can see in the Statutory Transcript, is there any doubt that Ms. Shaper held this type of bond in question?

A I think there is significant doubt because the documentation isn't there to support what she did.

Q Are you only requesting documentation with respect to income from the bond?

A That is what she's asking—That is what she's using as the basis for her refund.

Q And the return showed, that is the Ohio return, that income, and she paid the tax on it, didn't she?

A The originally filed return showed an item of about $17,000-some-odd as non-Ohio interest.

Q And the department didn't question whether she owned the bonds at that time, did they, they took the money?

A Well, whenever an initial return is filed, we do not, at that time, question it. We question many returns later, but not at the time.

Q Okay. Of course, the application was executed by her under penalties of perjury?

A I can't confirm that because I don't know her signature. It indicates to be her signature.

MR. DE LEONE: That's all. Nothing further.

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